92-616

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1992.

IN THE MATTER OF THE WELFARE OF D.L.

STEPHEN SHARP and JANET SHARP,
PETITIONERS,

v.

HENNEPIN COUNTY
BUREAU OF SOCIAL SERVICES
RESPONDENTS,

v.

HILTON WALKER and INELL WALKER,
RESPONDENTS

Petition and Appendix for Writ of Certiorari to the Supreme Court for the State of Minnesota.

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Questions Presented for Review.

A. Whether Petitioners were deprived of a fair trial by an impartial tribunal in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

B. Whether Petitioners were deprived of due process and equal protection under the Fourteenth Amendment to the United States Constitution by the Minnesota Supreme Court when it affirmed the trial court's order that was based on a statute declared by the Court of Appeals to violate the Equal Protection Clause of the United States Constitution.

C. Whether Petitioners who were denied the right to present their Petition to Adopt were denied equal protection under the Fourteenth Amendment to the United States Constitution.

List of All Parties.

Stephen Sharp and Jane Sharp, Petitioners

Hennepin County Bureau of Social Services, Respondents

Hilton Walker and Inell Walker, Respondents

Jane Esbensen Moore, Guardian ad Litem

Minnesota Department of Human Services

NAACP, Amicus Curiae

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HILTON WALKER AND INELL WALKER,
INTERVENORS.

Petition for Writ of Certiorari to the Supreme Court for the State of Minnesota.

Petitioners pray that a Writ of Certiorari issue to review and reverse a judgment of the Supreme Court of State of Minnesota entered June 12, 1992.

Citations to Opinion Below.

479 N.W.2d 408 (MINN. APP. 1991)

The decision of the Supreme Court filed June 12, 1992 is not yet reported.

Jurisdiction.

On December 31, 1991, the Court of Appeals for the State of Minnesota entered judgment affirming the trial court's granting the grandparents petitioners to adopt D.L.

On June 12, 1992, the Minnesota Supreme Court affirmed the judgment of the Court of Appeals.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a)

Constitutional Provisions.

The following Constitutional Amendment is involved:

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions.

The following federal and state statute is involved:

Minnesota Statute §259.28, Subd. 2

Subd. 2. Protection of heritage or background. The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due consideration of the child's minority or minority ethnic heritage in adoption placements. For purposes of intercountry adoptions, due consideration is deemed to have occurred if the appropriate authority in the child's country of birth has approved the placement of the child.

In the adoption of a child of minority racial or minority ethnic heritage, in reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or if that is not feasible, to (c) a family of different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child's racial or ethnic heritage.

If the child's genetic parent or parents explicitly request that the preference described in clause (a) or in clauses (a) and (b) not be followed, the court shall honor that request consistent with the best interests of the child.

If the child's genetic parent or parents express a preference for placing the child in an adoptive home of the same or a similar religious background to that of the genetic parent or parents, in following the preferences in clause (a) or (b), the court shall place the child with a family that also meets the genetic parent's religious preference. Only if no family is available as described in clause (a) or (b) may the court give preference to a family described in clause (c) that meets the parent's religious preference.

Statement of Facts.

A. The Factual Background.

D.L. was born and abandoned by her mother on July 12, 1989. On July 16, 1989 she was placed in Petitioners' home as a foster child.

In August of 1990, the State of Minnesota Council on Black Minnesotans, African American Children and Family Survival Committee, issued a list of demands based upon the "Minority Heritage Child Protection Act" Minn. Stat., §259.28, Subd. 2. The demands required, among other things, that: "1) All African American children who are presently placed with white foster families must be moved immediately and placed with African American foster families. 2) All African American

children in the future must be placed with African American foster/adoptive families. (App. p.69a)

On September 20, 1990, Petitioners informed D.L.'s adoption worker (Penny Scheffler) that they wished to adopt D.L. and had a home study already prepared. Following this meeting, Ms. Scheffler learned about the Grandmother. Ms. Scheffler telephoned the Grandmother who lives in Virginia. The Grandmother's testimony at a pre-trial deposition (read at trial for impeachment purposes) revealed that she was not asked even the most basic questions: how old she was, about her health, if she was ever involved with abuse or neglect, if she had a criminal record, if any of her children had criminal records, or how many children were in her home. (App. p. 65a-68a, Tr. vol. 1, at pp. 155-156) At the conclusion of this telephone call, Ms. Scheffler told the Grandmother that she could fly to Minnesota, stay three days and return with D.L. to Virginia on the fourth. (*Id.* at p. 154) The Grandparents were already raising 2 of 3 siblings who their daughter had abandoned.

On October 2, 1990, Ms. Malfeld informed Petitioners that the Grandmother would come to Minnesota for three days and on the fourth take D.L. home. Ms. Malfeld refused to consider Petitioners as adoptive parents for D.L. stating that even in the absence of family, D.L. would be placed in a same-race home in accordance with the "Heritage Act", Minn. Stat., §259.28, Subd. 2. (Tr. vol. 7, at p. 12) (Finding 30, App. 9a)

Petitioners filed their petition to adopt and motion for a temporary restraining order on October 5, 1991. On October 11, 1991, following the hearing, the Grandmother saw D.L. for the first time.

Visitations between D.L. and the grandparents began on a regular basis thereafter. The grandparents filed their petition to adopt in November, 1990.

B. The Adoption Proceedings.

The adoption petitions of both parties were scheduled to be heard on January 14, 1991, before the Honorable Isabel Gomez, Judge of Hennepin County District Court, Juvenile Division, State of Minnesota. On January 11, 1991, Judge Gomez excluded Petitioners' petition from consideration under Minn. Stat., §259.28, Subd. 2. The sole issue tried was whether there was good cause not to prefer the Grandparents to adopt D.L. The trial lasted 8 days. Petitioners objected to application of Minn. Stat., §259.28, Subd. 2 as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Federal Constitution.

At trial, Petitioners called four expert witnesses who all testified to a reasonable degree of certainty that D.L. would suffer permanent psychological harm if removed from Petitioners' home. Hennepin County called two witnesses who acknowledged trauma to D.L. if removed but were more optimistic about the child's "resiliency". They opined the harm would be temporary.

Following trial, the trial court ordered briefs on the constitutionality of Minn. Stat., §259.28, Subd. 2. On April 19, 1992, the trial court issued its Findings of Fact, Conclusions of Law, and Order in favor of the grandparents, and a memorandum holding Minn. Stat., §259.28, Subd. 2 constitutional.

On May 7, 1991, Petitioners filed a Motion for Amended Findings of Fact, Conclusions of Law, and Order for Judgment, or in the Alternative for a New Trial, arguing again that Minn. Stat., §259.28, Subd. 2 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

On June 10, 1991, the trial court denied Petitioners' motion.

C. The Appellate History.

On July 3, 1991, Petitioners filed an appeal with the Minnesota Court of Appeals from the Order denying the motion for a new trial, and again raised the argument that Minn. Stat., §259.28, Subd. 2, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The Suburban Branch of the Minnesota Chapter of the National Association for the Advancement of Colored People (NAACP) was permitted to present a brief as Amicus Curiae in support of Petitioners' positions.

On December 31, 1991, the Minnesota Court of Appeals affirmed the trial court's order granting the grandparents' petition to adopt, but held that Minn. Stat., §259.28, Subd. 2 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[1]

On February 27, 1992, the Minnesota Supreme Court granted review of the decision of the Minnesota Court of Appeals, and granted the request of the NAACP to participate as amicus curiae in support of Petitioners' positions.[2]

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1 Following the Minnesota Court of Appeals decision, the Minnesota Legislature amended the statute requiring courts to consider the race and ethnicity of all children, not just minorities, thus applying the race-matching criteria to all. Such "even-handed" treatment was insufficient to save the anti-miscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967), *see* discussion, *infra*.

2 The county originally sought the intervention of the NAACP because of the involvement of this case presenting a "first impression constitutional challenge to the cultural preferences in Minnesota's adoption laws." The NAACP instead joined on the side of Petitioners in writing amicus briefs to the Court of Appeals and the Supreme Court. (See App. p. 94a)

On March 10, 1992, Petitioners filed their briefs with the Minnesota Supreme Court, arguing that even though no one appealed the portion of the Minnesota Court of Appeal's holding that Minn. Stat., §259.28, Subd. 2 was unconstitutional, Petitioners urged the Minnesota Supreme Court to not overrule that part of the decision.

On June 12, 1992, the Minnesota Supreme Court affirmed the Court of Appeals decision. It did not reach the issue of the constitutionality of Minn. Stat., §259.28, Subd. 2. The Minnesota Supreme Court dissolved the temporary restraining order which permitted the removal of D.L. from Petitioners' home. She was removed to the grandparent's home shortly thereafter.

D.L. was now 35 months old and was taken from the only home she had ever known.

Reasons for Granting of this Writ.

I. THE MINNESOTA SUPREME COURT HAS SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED OR USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE TRIAL COURT AS TO CALL FOR THIS COURT'S SUPERVISION.

A. Whether Petitioners were deprived of a fair trial by an impartial tribunal in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

1) The bias of the trial court on the very issues before the court were expressed in an article written by the trial court six months before trial.

The trial court, unbeknown to Petitioners until after trial, had written an article in a local newspaper approximately 6 months prior to trial (and quoted in the Minnesota Supreme court opinion)[3] expressing the belief that the vast majority of white Minnesotans were either "radical ethnocentrics", or those that were not "racists" try to make people of color into reasonable white facsimiles. Given the Heritage Act's requirement that a minority child can only be placed into a family of different race if the family is knowledgeable and appreciative of the child's heritage and culture, Petitioners were doomed from the outset. Clearly, the trial court would not view white Petitioners as being appreciative of a black child's heritage since to the trial court Petitioners must be either racists or will try to make D.L. into a white facsimile.

2) The trial court's bias was reflected in its rulings throughout the trial in which it restricted cross examination of county employees designed to show bias and motive for their decisions involving the placement of D.L.

The implication is strong that the trial court's decision not to even consider whether the child's best interests might be served by remaining in the only home the child had ever known was motivated by the trial court's own bias. This implication is furthered by the trial court's rulings which were protective of Hennepin County policies of racial favoritism towards Blacks and Native Americans (the only racial groups for which "ADVOCATES" are hired by Hennepin County). The trial court stopped crucial cross-examinations designed to expose Hennepin County's policies, and the biases of the

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3 App. pp. 54a-55a.

social workers, ruling that she was familiar with the policies and the reasons for them, and found them acceptable. The court's attitudes and restrictive rulings before and during deprived Petitioners of a trial by an impartial tribunal. (App. pp. 88a-93a, reprinted from Section III of Petitioners' Brief to the Minnesota Court of Appeals, pp. 41-46) Yet the policies and witnesses the trial court protected had fostered the racial issues in this case.

Encouraging racial segregation in this day cannot be tolerated under the Constitution, but in Minnesota the State of Minnesota Council on Black Minnesotan's own subcommittee demanded, based on the challenged statute, the immediate removal of all black children from white homes and a bar to cross-racial adoptions. (App. pp 69a-71a) Hennepin County has not only tolerated this demand but has acted on it. Indeed, the Federal Office of Civil Rights, Department of Health and Human Services, has already declared Hennepin County violated federal law by its race-based conduct. (App. pp. 75a-87a)

Hennepin County's tolerance for racial segregation, its sponsorship of the African American Advocates office with county funds specifically to enforce the unconstitutional mandates of the statute, and its support of the social workers in this case whose actions were racially motivated, provides support for the observation of Harvard law professor Elizabeth Bartholet in her law review article *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139(5) Univ.Penn.L.Rev. 1163-1256 (May 1991) that :

> It is black adoption workers who have most vocally promoted the policies and who have condemned transracial adoption as a form of white racism.

(*Id.*, p. 1243) Two members of the Council on Black Minnesotans subcommittee that drafted the patently racist provision calling for the immediate removal of *all* black children from white homes and an end to transracial adoptions *were assigned by Hennepin County to the instant case*. Carol White was D.L.'s African American Advocate. Jean Webb was the child's adoption worker. (App. p.72a)

Given the obvious racial animus these women felt towards black children in white homes, it is no wonder permission to move the child to the grandparents' home was given without even inquiring about the age, health, criminal/abuse record of the Grandmother.[4]

Given the article written by the trial court, the protection of Hennepin County's policies and social workers from the scrutiny of cross examination seems reflective of the biases expressed in the article.

The trial court, in ruling that the grandparents' petition would be granted, while refusing to hear the foster parents' petition, made repeated references to race in its Findings and Memorandum. Some showed the same bias reflected in the newspaper article written by the trial court. See Findings 82-86 (App. 20a) and Memorandum (App. 27a-30a).

Thus, the trial court commented that placing children of color in same-race homes "makes it likelier that they will learn the coping skills necessary to thrive in a white culture". (Finding 82, App. 20a)

In the Memorandum accompanying the Findings, the trial court referred to the placement of African-American

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4 There was no detrimental information that would have been disclosed. The point is that Hennepin County acted without inquiry. (*See* Finding 35, App. p. 10a, bearing on this) Coupled with the statement that if the grandparents' home was found not to be "suitable", D.L. would still be required to be placed in a black home, is clear evidence of the race-based decision.

children who had been placed in white homes in terms of the children being "subjected" to that. (App. 28a)

B. Whether the Supreme Court's failure to meaningfully address the claims of trial court prejudice is tantamount to sanctioning the behavior of the trial court justifying the issuance of the Writ sought.

The Minnesota Supreme Court paid little attention to the evidence that formed the basis for the claim of bias on the part of the trial court, stating without discussion that "We find these claims to be without merit." Yet what the trial court had done was to protect the social workers during cross examination designed to show their bias. The trial court further stopped inquiry into Hennepin County's policies which funded Advocates for African-American and Native Americans *only* – and became an apologist for that policy. Not a word was written by the trial court, the court of appeals, or the Minnesota Supreme Court about the fact that the African-American Advocate *and* the social worker assigned to the case before the court were *actually members of the very organization that was insisting on the removal of all black children from white homes.* The Minnesota Supreme Court dismissed the allegations of prejudice in the appeal, without discussion, by saying they were "without merit." Yet racial bias was at the core of the case.

The Minnesota Supreme Court similarly avoided any analysis regarding the article written by the trial court. This article went to the heart of the issues presented in the case. Either white Minnesotans are "radical ethnocentrics" or if they do not want to be "racists" they will try to turn people of color into "reasonable white facsimiles." With a trial court thinking like this, there was

no chance for a white couple to adopt a black child before that trial court.

The Minnesota Supreme Court, other than setting forth the quotation stating that the Petitioners found it "particularly bothersome," never mentioned it again in the decision.

It is for this reason that this Court's supervision is requested pursuant to Rule 10.1(a), Supreme Court Rules.

II. THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Whether Petitioners were deprived of due process and equal protection by the Minnesota Supreme Court when it affirmed lower court's order that was based on a statute declared by the Court of Appeals to violate the Equal Protection Clause of the United States Constitution?

In *Palmore v. Sidoti*, 466 U.S. 429 (1984) this Court strongly expressed its distaste for racially-based custody decisions when it held that while it may be true "[t]he Constitution cannot control such prejudices ... neither can it tolerate them." *Id.* at 433. In the instant case, race-based placement policies were not only tolerated, but were in effect supported by the Minnesota Supreme Court's refusal to reverse the trial court's application of a *mandatory* preference based solely on the race-based statute which was declared unconstitutional by the Court of Appeals.

The trial court based its decision on a 1983 law[5] that applied exclusively to minorities – a law which Minnesota's

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5 The instant case was tried and decided on the relative preference set forth in Minnesota Statute §259.28, Subd. 2. (App. p. 23a, Trial Court Memorandum)

intermediate Court of Appeals declared an unconstitutional violation of the Equal Protection Clause. Even though the trial court's order was based upon the unconstitutional race-based law dictating *mandatory* placement preferences for *minority* children, the Minnesota Supreme Court affirmed the trial court's removal of the child, basing its decision not on the statute, but rather on a "common law" notion that family placements are in the best interests of children, even though the Court recognized that statutory law alone confers authority to declare adoptions. (See discussion, *infra*.)

1) Whether Petitioners were deprived of due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the Minnesota Supreme Court when it affirmed the lower court's decision but failed to base its decision on statutory law applicable and necessary to adoption proceedings?

The Minnesota Supreme Court conceded that in Minnesota "adoption is a creation of statute" and the "power to decree an adoption is purely statutory, and the statute is the measure of the court's authority. (App. p.56a). It acknowledged that there is no common law adoption. In essence, the Minnesota Supreme Court acknowledged that the only lawful basis upon which to declare an adoption is by virtue of statute.

Despite the necessity of basing a decree of adoption on the statute, and even though the trial court's order was based exclusively upon Minnesota Statute §259.28, Subd. 2, the Minnesota Supreme Court refused to expressly overrule the Minnesota Court of Appeals decision that the statute was unconstitutional. Instead, it held that statutes

are presumptively constitutional, and should not be declared unconstitutional unless absolutely necessary. Then it held that it need not reach the constitutional issue at all, relying on common law (involving *custody* cases and not *adoption*) holding that *presumptively* family placements are in the best interest of children, regardless of race or heritage.

Since Minnesota Statute §259.28, Subd. 2 was the *only* statutory basis upon which the trial court's order rests, and the Minnesota Court of Appeal's holding that the statute was unconstitutional was not specifically overruled, there is no valid statutory basis supporting the decree of adoption. Thus, the Minnesota Supreme Court effectively deprived Petitioners of due process by upholding a decree of adoption that has no valid statutory basis.

2) Federal Court of Appeals and State Supreme Court are in conflict with the decisions of the United States Supreme Court.

As exhibited in Harvard law professor Elizabeth Bartholet's law review article, *supra*, the federal courts have rendered decisions which are in conflict with other federal decisions on what factor race should play in adoptions. The instant action provides this Court with an opportunity to resolve this conflicting application of law in an area which sorely needs consistency.

Professor Bartholet has distinguished three conflicting ways in which courts apply the race factor. (*Id.*, p. 1239) Some courts permit race to be merely *a* factor, but not the sole or dispositive factor. (*See, id.* footnote 212 citing *inter alia*, *McLaughlin v. Pernsley*, 693 F.Supp. 318, 324 (E.D.Pa. 1988), aff'd on other grounds, 876 F.2d 308 (3rd Cir. 1989) (holding that removal of black child from white foster parents due solely to race an unconstitutional violation of equal protection); *In re Adoption of a Minor*,

228 F.2d 446, 448 (D.C. Cir. 1955) (stating that race may not be the "determinative factor"); *In re Davis*, 502 Pa. 110, 130, 465 A.2d 614, 624 (1983) (noting that race "cannot be unduly emphasized ...).

Other courts have permitted race to "be used as a significant and even determinative factor". (*Id.*, footnote 213, citing *inter alia*, *Drummond v. Fulton County*, 563 F.2d 1200, 1205 (5th Cir. 1977)(en banc), *cert. denied*, 432 U.S. 905 (1978)(permitting race to be used as a decisive factor").

Yet other courts have "actually require[d] that race be considered" as a factor. (*Id.*, pp. 1239-40, footnote 214, citing *inter alia Drummond*, 563 F.2d at 1205-06 referring to the court's statement that the agency has a "responsibility" to consider race.

3) The race formulas used by the various courts are in conflict with the decisions of the United States Supreme Court.

In addition to the conflicting weight courts give the race factor, Professor Bartholet has argued persuasively that all of the different race-laden formulas being applied in the courts conflict with decisions issued by this Court.

> Current racial matching policies are in conflict with the basic law of the land on race discrimination. And they are anomalous. In no other area do state and state-licensed decisionmakers use race so systematically as the basis for action. In no other area do they promote the use of race so openly.

Id. p. 1226. Professor Bartholet goes on to cite *Loving v. Virginia*, and *Palmore v. Sidoti*, among other cases in support of her arguments.

Not only is the race-based decisionmaking of the courts throughout the country in conflict with this Court's fundamental rulings designed to root out segregationist policies, they are actually harmful to the minority children, according to Professor Bartholet. (*Id.*, sec. III and IV, pp. 1183-1207). Further, contrary to the arguments made in support of inrace adoptions, the empirical studies show that children are not harmed by transracial adoptions. (*Id.*, sec. V, pp. 1207-1223)

Some courts in this country, possibly bending to the political pressure, and possibly thinking there is merit in segregation if it involves adoption, have permitted the revival of separatist principles condemned in *Loving v. Virginia*. It has only been 25 years since divisive thoughts like that were prevalent. Now they are returning in force with the unwitting support of rulings that ironically are now furthered by some minorities.

At a time in this country when race-based decisionmaking has the potential of undermining racial equality, it is respectfully urged that this Court accept review of the instant action, and take this opportunity to reaffirm the Constitutional proscription against racial segregation as announced in past cases involving marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)), education (*Brown v. Board of Education*, 347 U.S. 483 (1954)), and custody (*Palmore v. Sidoti*), and apply it to adoption as well.

III. WHETHER PETITIONERS WHO WERE DENIED THE RIGHT TO PRESENT THEIR PETITION FOR ADOPTION WERE DENIED EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners were denied the right to proceed with their Petition to adopt D.L. The trial court, in refusing to

hear the petition of Petitioners, relied upon the statute (later found to be unconstitutional by the Court of Appeals) in stating that the statute mandated a family preference. Thus Petitioners were relegated to the limited position of only being able to present evidence whether there was "good cause" under the wording of the statute not to allow the grandparents to adopt.

Petitioners had actually petitioned first for adoption of D.L. The grandparents were "Intervenors" in the case. On January 11, 1991, the Friday before the Monday hearing, the trial court informed Petitioners they would not be allowed to proceed with their Petition to adopt.

The Minnesota Supreme Court approved of this procedure.

It is submitted that Petitioners were denied equal access to the courts in violation of their rights under the Fourteenth Amendment of the United States Constitution.

Conclusion.

For the reasons given, it is urged that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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Appendix to Petition for Writ of Certiorari to the Supreme Court for the State of Minnesota.

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STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT
JUVENILE DIVISION

DISTRICT COURT NO. AD-170884

STEPHEN SHARP and JANET SHARP

vs.

HENNEPIN COUNTY, BUREAU OF SOCIAL SERVICES

vs.

HILTON WALKER and INELL WALKER

FINDINGS and ORDER

GOMEZ, I.

On January 14, 1991, the above-captioned adoption case came on for trial of the question: Is there good cause why the Court should not prefer the grandparents of Daniesha Lofgren to become the child's adoptive parents, pursuant to Minn. Stat. 259.28, Subd. 2. Petitioners Stephen and Janet Sharp, Daniesha's foster parents, were present and represented by Stewart Perry and Shane Perry. Respondent Hennepin County Bureau of Social Services was represented by William Nieman and Nancy Jones. Intervenors Hilton and Inell Walker, Daniesha's grandparents, were present and represented by Steven Belton and Robert Barrows. Jane Esbensen Moore, the

child's Guardian ad Litem, was present and represented by George Stephenson and Wright Walling.

The Court heard testimony and received exhibits from various witnesses on January 14, 15, 16, 17, 18, 22, 23 and 25, 1991, and on February 8, 1991. The following individuals testified: Hilton Lee Walker; Inell Walker; Linda Berglin, a member of the Minnesota State Senate; Erika Walker, Daniesha Lofgren's aunt; Sandra R. Lawson, a Hennepin County social worker who did an adoption home study of the child's grandparents; Kenneth Watson, an expert in separation/attachment issues among adopted children; Lynn Malfield, a Hennepin County social worker who supervised the Hennepin County Adoption Unit's handling of the instant case; Dr. Winifred Scott, a licensed consulting psychologist who observed Daniesha with the Sharps and is an expert on attachment issues in abused and troubled children; Dr. C. L. Moore, a licensed psychologist who is an expert on child development and attachment issues in troubled children; Dr. Jeffrey Alexander, a pediatrician with expertise in child development; Carol Ogren, a Hennepin County social worker who is Division Manager of Hennepin County Family Services; Penny Scheffler, the initial Hennepin County social worker on this case; Jean Webb, a Hennepin County social worker who recruits adoptive families and handled this case after Penny Scheffler; Leanne Miller, supervisor of adoption services at New Life Family Services; Stephen Sharp; Janet Sharp; Dr. Lawrence Kutner, a psychologist who is an expert in child development; Cindy Barlow, the Sharps' daughter; Roderick Franks, at the relevant time, a New Life Home social worker; Dr. Byron Egeland, a professor of child psychology at the University of Minnesota; and Jane Esbensen Moore.

Following the close of the evidentiary hearing, the Court received counsels' briefs on the constitutionality of

M.S.A. 259.28, Subd. 2, the law relied on in this adoption case, and also received counsels' written closing arguments and post-trial briefs. The last of these was submitted to the Court on March 15, 1991.

Based upon all of the evidence and exhibits, upon case law and statutes, upon the Court's own files in this matter, and giving due consideration to the briefs and arguments of counsel, the Court makes the following

FINDINGS OF FACT

1. Daniesha Lofgren was born on July 12, 1989, to Deborah Lofgren.

   a. Deborah Lofgren is Afro-American; so is Daniesha.

2. Deborah Lofgren is the oldest child of Hilton and Inell Walker; who are Afro-American.

   a. She graduated from high school and went on to college.

   b. She married Jonathan Lofgren in December of 1983, in Halifax County, Virginia; after their marriage, the couple lived in Minnesota.

3. Deborah and Jonathan Lofgren had three children while their marriage was intact; Daniesha was born before their divorce, but after they had separated.

   a. The other three children are: Temeika, 8; Tierra, 6; and Alandre, 5.

4. When Deborah and Jonathan Lofgren separated in the winter of 1988, she lived alone with the three oldest children.

   a. Mrs. Walker, believing her daughter needed money, sent her about $250.00 per month.

   b. Mrs. Walker urged Deborah to go back home and let her parents help with the children.

   c. In June of 1988, Deborah took the children to Virginia and left them with her parents.

d. Deborah returned to Minnesota, and she reduced her communication with her parents to occasional evasive phone calls.

e. Because Deborah could not be reached at the phone numbers she gave her mother, the Walkers had to settle for talking with her when Deborah called.

5. Deborah Lofgren gave Daniesha over to New Life Family Services; the agency placed the child in the foster home of Stephen and Janet Sharp on July 16, 1989.

a. The Sharps are not Afro-American.

6. In early September of 1989, Deborah told her mother she had had a baby and that she had placed the baby with foster parents until she could care for the child herself.

a. The baby, Daniesha, was then about two months old.

b. Deborah hung up when her mother pressed for more information.

c. Mrs. Walker was concerned about her daughter and the new child; but Deborah had lied about her telephone number and whereabouts, and Mrs. Walker also feared she might not be telling the truth about the new baby.

d. Mrs. Walker had no way to get more information about the child, other than waiting for her daughter to call again.

7. In late October of 1989, Deborah called her parents again. She said the baby was still with nice people, but that she couldn't tell her mother how to contact them.

a. Mrs. Walker told Deborah to bring the baby to Virginia, and Deborah said she would bring her home for Christmas.

8. In December of 1989, Deborah Lofgren requested of New Life Services that she be allowed to take her baby to visit her mother.

a. The agency consulted with Mrs. Sharp, who did not want Daniesha to go, because she feared Deborah would not bring the child back from her mother's home.

b. Deborah was not allowed to take Daniesha to Virginia.

9. On December 22, 1989, Deborah called home and told Mrs. Walker to pick her up at the airport, and what day she was coming in.

a. She did not arrive on the scheduled day, and she did not call until after her mother had arrived home after giving up on seeing her at the airport.

10. Deborah finally arrived in Virginia at 11:00 p.m. on Christmas Eve, when she called from a bus station to be picked up; she did not have Daniesha with her, and she would not explain why.

a. Mrs. Walker pressed Deborah to come home to live with the baby.

b. After Christmas, Deborah returned to Minnesota.

11. When Deborah Lofgren placed Daniesha with New Life Family Services, she did not give the agency any information about her family.

a. She failed to keep appointments with the agency's social worker.

b. She gave a false address.

c. Finally, the agency was unable to reach her at all.

12. New Life Family Services made almost no effort to find Daniesha's extended family; Deborah gave the agency no more information about her parents than she gave her parents about the agency.

13. The Walkers did not hear anything from or about Deborah until February of 1990, when her mother learned she was in jail in Minneapolis.

14. When Mrs. Walker next talked to her on the telephone, Deborah would not say exactly why she was in jail. She said that she was all right, that the baby was with good people, and that she would take care of her.

a. Mrs. Walker was not allowed to telephone her daughter at the jail, but she wrote her and sent her money every week or two.

15. Deborah next called Mrs. Walker in early July of 1990 and told her that if she couldn't get out of jail she was going to lose Daniesha.

a. Deborah revealed that she had never told the agency or foster parents she was in jail because she thought she would lose custody if she did so.

b. Now, she was threatened with losing the baby because she had not had any contact with her for so long.

c. At this point, Daniesha was almost a year old.

16. Mrs. Walker urged her daughter to call the foster placement agency at once and tell them Mrs. Walker would be there as soon as possible.

a. Mrs. Walker could not immediately go to Minneapolis because she had no money with which to do so.

17. On July 27, 1990, Mrs. Walker flew out of Lynchburg and into Minneapolis, where she was met by her son-in-law, Jonathan Lofgren, and her grandson, Alandre.

18. The Walkers had returned Alandre to Jonathan in August of 1989, when he was three years old.

a. Alandre had yearned for a father and repeatedly called his Uncle Eric "Daddy."

b. The Walkers allowed Alandre to talk to Jonathan on the telephone, because of this clear need for a father on the child's part.

c. Jonathan eventually asked for his son's return, claiming that he had straightened out his life and would care for him well.

d. Mrs. Walker had misgivings about Lofgren as a parent, because of his failure to care for his children earlier.

e. Mrs. Walker consulted with Jonathan Lofgren's mother about the situation.

f. Mrs. Lofgren stated that she would help her son care for Alandre when Jonathan was at work and on weekends, and that she would fully support Jonathan in parenting.

g. Mrs. Walker believed she could never justify to Alandre why she had kept him from his father in these circumstances.

h. The Walkers gave Alandre up to Jonathan Lofgren, because they decided it was in the child's best interests to do so.

19. On July 28, 1989, Mrs. Walker talked to Deborah in the Minneapolis jail.

a. Mrs. Walker learned the phone number of New Life Homes, the agency with which Daniesha had been placed.

b. She learned that Deborah knew nothing - not even the names - of the foster parents caring for Daniesha.

20. Mrs. Walker contacted New Life Homes and a social worker, Rod Franks, tried to set up a meeting with Daniesha for her.

a. She did not see Daniesha because the Sharps were out of town with the baby.

21. Mrs. Walker was told by Rod Franks that she had arrived in Minnesota too late to claim Daniesha, who was now going to be placed for adoption.

22. Mrs. Walker told Rod Franks that she and her husband wanted to adopt Daniesha and he said he would notify Hennepin County's Adoption Unit of that fact.

23. The Hennepin County Juvenile Court terminated the parental rights of Deborah and Jonathan Lofgren to Daniesha by an order filed on August 16, 1990.

a. Daniesha then became a ward of the State, with the Minnesota Commissioner of Human Services as guardian and legal custodian of the child.

b. Daniesha's physical custody has remained with the foster parents.

c. Hennepin County has exercised the role of legal custodian for the State of Minnesota.

24. Daniesha Lofgren owns no real estate or other real property.

25. While in Minneapolis, Mrs. Walker had asked Franks for a picture of Daniesha; it arrived in two weeks with a note saying that a caseworker would contact her "if appropriate."

a. The equivocal nature of the note startled Mrs. Walker, who immediately made efforts to reach Rod Franks.

b. From Franks, Mrs. Walker got a Hennepin Social Services number through which she was eventually able to talk to an adoption caseworker.

26. Lynn Malfield, then supervisor of the Hennepin County Adoption Unit, received the telephone call from Inell Walker requesting that the Walkers be given Daniesha's custody the day after she received the file, in September, 1990.

27. Ms. Malfield assigned Penny Scheffler to be the social worker on the case; she expected Scheffler to contact the Sharps and begin to develop a case plan.

28. At the time Hennepin County's Adoption Unit began to work on a permanency plan for Daniesha, Penny Scheffler got basic health and developmental information on the baby from talking with the Sharps and copying information from a book in which they recorded such data.

29. Malfield and Scheffler had several contacts about the case and decided they should pursue placement with the Walkers, in compliance with Minnesota law.

30. Knowing that the Sharps had expressed an interest in adopting Daniesha, Malfield and Scheffler visited them to inform them of the legal preferences for kin and for racially-same homes in the adoption of minority-race children.

31. Mrs. Walker first saw her granddaughter, Daniesha, on October 4, 1990.

a. Mrs. Walker had come to Minneapolis at the invitation of the Hennepin County Social Services Adoption Unit, who had told her she could take the baby to Virginia with her after three days of visits with the foster parents.

b. While waiting to see the baby, Mrs. Walker learned that the Sharps were seeking a restraining order to prevent Daniesha's removal.

32. Stephen and Janet Sharp filed a petition to adopt Daniesha on October 5, 1990.

33. Hennepin County's decision to allow Mrs. Walker to take her granddaughter to Virginia in October, if her visit in Minneapolis provided positive evidence to support the preliminary finding that the Walkers were a suitable family placement for a state ward, was not a decision to allow the Walkers to adopt. It was the start of

the County's pursuing relative adoptive placement, in accord with M.S.A. §258.29, Subd. 2.

34. There have been three or four other Hennepin County Adoption Unit cases in which the County decided to place a child with likely relatives prior to a home study and final approval of those relatives as adoptive parents.

35. In deciding to move Daniesha to Virginia prior to completing a home study of the Walkers, Hennepin County did not adequately weigh the impact on Daniesha of needlessly disrupting her attachment to the Sharps, in the event that the Walkers turned out to be inappropriate as adoptive parents.

36. On October 11, this Court granted a temporary restraining order to the Sharps, preventing the County from removing Daniesha from the Sharps' home until the Court could hear evidence that would make it possible to determine whether the child would be harmed by the proposed move.

a. The written temporary restraining order was signed by the Court on October 12, 1990.

37. This Court granted Inell and Hilton Walker permission to intervene in this matter when they appeared at the hearing on the Temporary Restraining Order, indicating that they were Daniesha's grandparents and hoped to adopt her.

38. Mrs. Walker was first able to see her granddaughter on October 11, 1990.

39. The Walkers filed their petition to adopt Daniesha with this Court on November 8, 1990.

40. Mrs. Walker visited Daniesha every week after that first week, except for one week when she was hospitalized for shoulder surgery.

41. Hilton Walker came with his wife to Minnesota to see his grandchild for ten weeks.

42. The Walkers could not have afforded to visit Daniesha often if they had to rely on their own income.

43. Hennepin County Social Services' Family Services Unit paid amounts it deemed fair and appropriate to the Walkers to cover the costs of their visits to Daniesha while the instant litigation was pending.

a. The Walkers did not ask for any particular expenses to be covered; they did not have input in designing the Family Services policies that determined what payments were appropriate; they provided truthfully all the information for which they were asked by Family Services.

44. The money paid to the Walkers was not a motivator for their interest in adopting their granddaughter. They were determined before payments began to gain Daniesha's custody, out of parental love and intense family loyalty.

45. Hennepin County's social work in this matter, including the payments made to the Walkers to facilitate visits with Daniesha, is consistent with the case work in other similar adoption matters.

a. The total amount paid for the Walkers' involvement with their grandchild is higher than usual because of the time delay attributable to the instant litigation.

46. A relative home study of the Hilton & Inell Walker home was done on 11/10/90 by Hennepin County social worker Sandra Lawson.

a. Virginia authorities did a check to ascertain that the Walkers had not criminal or child abuse / neglect records.

b. The Walkers' neighbors, family members and church deacon were interviewed for the study.

c. The social worker who did the study made five visits to the Walkers' home.

d. The Walkers' medical history was checked by a Virginia social worker.

e. The Walkers' financial status was evaluated by Virginia social services for Hennepin County.

47. The home study of the Walker home by Sandra Lawson is comparable to the home studies commonly presented to this Court in adoption cases.

48. It is the recommendation of the Hennepin County Adoption Unit that the Walkers become Daniesha's adoptive parents.

a. A Halifax County, Virginia, home study concurs with Hennepin County's home study in recommending that the Walkers be allowed to adopt Daniesha.

49. If the facts in this case were the same, except that the Walkers were white, Hennepin County's position would be the same, because the Walkers are the child's grandparents.

a. Hennepin County has previously placed Afro-American children with white grandparents and with other white relatives.

50. Hilton Lee Walker and Inell Jennings Walker are Daniesha Lofgren's maternal grandparents.

a. They live at Route 3, Box 459, Nathalie, Virginia 24577.

b. Hilton, age 51, was born on December 20, 1939.

c. Inell, age 48, was born on November 22, 1942.

d. The Walkers were married on February 22, 1962.

e. Inell was born in Halifax County, Virginia, where she and her husband now reside.

f. Hilton was born 20 miles away, in Pennsylvania County, Virginia.

g. Each of the Walkers was the oldest child in a large tobacco-farming family.

h. Inell cared for her siblings while her mother helped her father in the fields.

i. Hilton quit school after the eighth grade because he had to work to support his brothers and sisters.

j. The Walkers married two years after their first child, Deborah, was born; earlier, Hilton had been unable to care for a wife and child, because he was still supporting his mother and siblings; he helped Inell's parents support her and Deborah for those first two years.

k. When the Walkers married in 1962, they lived for a while with Hilton's family.

l. Hilton then sharecropped for two years, while working an extra job.

m. Hilton then went to work for the Lane Company.

n. Hilton started at the Lynchburg Foundry in 1968, and he has worked there ever since.

o. In 1969, the Walkers were living in a trailer on a rented space. Mr. Walker bought a piece of land on which to put the trailer. In 1973, they built a house, managing to utilize the well and septic tank that had formerly served the trailer.

p. The Walkers now own a four-bedroom brick rambler with a large yard.

q. The Walkers go to two churches on Sunday. Mr. Walker teaches Sunday School at Second Buffalo Baptist, while Ricefields Baptist is their "home church."

r. The Walkers and their dependents have good health insurance, which covers their medical needs fully.

51. Inell Walker is in good health; a recent shoulder surgery has healed well and has not incapacitated her.

a. She does not drink alcoholic beverages or allow drinking in her home.

b. She does not use illegal drugs.

c. She has never been arrested and has never been accused of neglecting or abusing a child.

52. Hilton Walker is in good health; he takes pills for high blood pressure, but has been able to maintain his foundry job.

a. Apart from a DWI citation in 1969, Mr. Walker has never been arrested.

b. Following the DWI, Mr. Walker was cut in the leg in a work accident he attributes in part to the leftover effects of excessive week-end drinking; he stopped drinking corn whiskey in 1970, and has not consumed alcohol since then.

c. Mr. Walker has never used illegal drugs.

d. He has never been accused of neglecting or abusing a child.

53. Mrs. Walker has worked for Thomasville Furniture for 12 years.

54. Mrs. Walker took a leave of absence from Thomasville in October, 1990, so she could pursue adoption of Daniesha.

55. If the Walkers can adopt Daniesha, Mrs. Walker will quit her Thomasville job, because she believes the child will need a lot of attention and love and believes that she should be the primary caretaker.

a. Mrs. Walker hopes to turn her ceramics hobby – she has two kilns in a home workshop – into a paying business.

56. While the Walkers will feel the loss of Mrs. Walker's paycheck from Thomasville, their history of moving from poverty to a comfortable middle-class lifestyle while raising six children demonstrates that they will cope well with this change in their circumstances.

a. The Walkers have three grown, working children and extended family in Virginia to help them, if necessary.

b. The Walkers are solidly entrenched in their community and in their church life; they will have substantial social, psychological and religious support.

c. The Walkers have proven themselves to be thrifty, prudent and hard-working.

57. The Walkers have six children, of whom two are still at home full-time.

a. The children still at home are Erica, 17, and Antwan, 9.

b. Erica, who testified at trial, is a high school senior with a "B" average.

1. She likes math, English and French and is in a Spanish Club and an Art Club at school.

2. She has a car of her own.

3. She is planning on attending college and would like to be a lawyer.

4. She helps out with her younger brother and nieces and does some basic household chores.

c. Antwan is a Cub Scout, who enjoys reading for fun.

1. He has a learning disability, but still manages to do adequately at school.

2. His teachers comment favorably on his parents' involvement with school matters.

58. The Walkers also have legal and physical custody of Daniesha's sisters, Tierra and Temeika Lofgren.

a. Tierra is six years old, and Temeika is eight.

b. Tierra and Temeika are loyal to, and protective of, each other; they share toys and do school work together.

c. In contrast to Alandre, the girls have not expressed a longing for their father; they have said they want to be with the Walkers.

d. The two are very close, and the Walkers are determined that they should not be separated.

e. The Walkers have legal custody of the girls and will not give up either child voluntarily.

59. The children living in the Walkers' home are well-adjusted and cheerful.

60. The Walkers' adult children, except for Deborah, continue to live near their home in Virginia.

a. Eric, age 22, is working full time, after graduation from high school.

1. He was once arrested for DWI.

2. He often stays at his parents' home.

3. He has stayed with Erica and the younger children when his parents have come to Minnesota to pursue Daniesha's adoption.

b. DeeDee, 27, and LuVania, 24, live together in a house they're buying.

1. Both graduated from high school and have some college.

2. DeeDee is now studying to become a paralegal.

3. LuVania is a beautician.

c. These three young people are single and have had no children.

61. The Walkers have a large extended family living nearby and throughout Virginia.

62. The Walkers are stable, loving and nurturing parents; there is no reason to doubt that they will give Daniesha a good home if they are allowed to adopt her.

63. For purposes of this decision, the Court assumes that Janet and Stephen Sharp would be suitable adoptive parents for Daniesha.

a. The Sharps decided they wanted to adopt Daniesha when she was two months old.

b. The Sharps have been loving and nurturing caretakers for Daniesha thus far.

c. The Sharps have had 13 foster children prior to Daniesha; she is the only one they have sought to adopt.

d. The Sharps have an 18-year-old son who is graduating from high school this year; he sometimes babysits with Daniesha, who knows and trusts him.

e. The Sharps have older married children, as well.

64. An attachment of great significance occurs between a child and her primary caretaker during the first two or three years of life.

a. This attachment is the foundation of other relationships through a lifetime.

b. It is in this primary relationship that an individual learns to trust others.

65. If this primary attachment is broken, the child will feel a huge loss, but the injury resulting from the loss will heal well in most cases.

66. Many adopted children must manage the loss of a primary attachment, as they move from foster parents or birth parents to adoptive parents sometime during the first three years of life.

67. Daniesha Lofgren is a healthy, normal child with a healthy, normal attachment to her foster mother, Janet Sharp.

68. A child who has formed a healthy attachment to her primary caretaker is likely to be able to form another good attachment to another caretaker.

69. The likelihood of significant emotional problems resulting from moving a securely-attached child from one good home to another good home is very small.

70. Daniesha has a secure attachment to her foster parents, and it is likely she will form a secure attachment to her grandparents if she is adopted by them.

71. Daniesha is not an anxiously-attached child, and there is no reason to believe that she will form an anxious attachment to her grandparents if she is adopted by them.

a. It is unlikely that Daniesha will suffer the life-long difficulties anxiously-attached individuals suffer.

72. The psychological damage arising from a child's loss of her birth family is suggested by the central question for such children: "What is wrong with me that none of my blood family wanted me?"

73. Adopted children commonly have to work through problems arising from their loss of their birth families.

a. Children who are separated from kin may experience difficulty in clarifying their identities, because to do so they must reconcile within themselves being part of two families: a birth family and a nurturing family.

74. The benefits of family placement, where the family is healthy and loving, are life-long; the trauma of separation is temporary and heals well in most cases.

75. The trauma of moving an attached child from one good home to another good home likely will be visible in the child's conduct for 90 to 180 days. After that, the child is likely to be back on her developmental track.

76. Living with blood relatives provides a special security for children, since they live within the framework of family history and the family's cultural and genetic heritage.

77. The fact that Daniesha will suffer significant temporary pain when she is separated from the Sharps does not outweigh the life-long advantages to her of living in her natural family, surrounded by healthy, loving relatives, including her grandparents and siblings.

78. The likeliest immediate consequence of loss of attachment in the case of a child Daniesha's age would be such behaviors as regression in speech and toilet training, waking at night, clinginess, and frequent crying.

a. It is impossible to predict which of these will occur or, indeed, whether they will occur.

79. The loss experienced by children making a move like that Daniesha will make if she is adopted by her relatives can be mitigated by careful management.

a. Even a young child may be prepared to confront the loss through playing the move out, being talked to about the move, having the move acted out.

b. There can be a transition period in which the first family and adoptive family cooperate in making the move as smooth as possible.

c. The receiving family should understand that the move is traumatic to the child and be prepared to deal with whatever difficulties the child experiences.

d. The move will be less difficult if the child has a consistent primary caretaker in the new home, and if that home is loving and secure.

e. The child will be helped by bringing favorite toys and objects to her new home.

80. Both the Walkers and the Sharps have stated that they will involved themselves fully in any transition plan designed for Daniesha's welfare.

81. It is easier on children to place them with members of their own families, when that is a viable possibility.

82. It is easier on children to place them with same-race adoptive parents, when that is a viable possibility.

83. Placing children of color in a nurturing, healthy same-race home makes it likelier they will learn the coping skills necessary to thrive in a white culture.

84. At the time the legislature passed M.S.A. §259.28, virtually all white children placed for adoption in Minnesota were placed with white families.

a. There was an abundance of white foster homes, family placements and adoptive parents.

85. At the time the legislature passed M.S.A. §259.28, 80% of Afro-American children placed for adoption in Minnesota were being placed with non-relative white families.

86. At the time the legislature passed M.S.A. §259.28, child placement agencies and state child welfare agencies were lax in finding relatives of minority children, and in recruiting minority foster homes and adoptive parents.

CONCLUSIONS OF LAW

1. Hilton and Inell Walker have established a *prima facie* case in support of their Petition for the Adoption of Daniesha Lofgren.

2. It is in the best interests of Daniesha Lofgren that Hilton and Inell Walker become her adoptive parents.

3. Placement of Daniesha Lofgren with her maternal grandparents is consistent with the preference for relative adoption in Minn. Stat. §259.28, Subd. 2.

4. There is no good cause for the relative placement preference in Minn. Stat. §259.28, Subd. 2, not to be followed in this case.

5. It will not be detrimental to Daniesha Lofgren to be adopted by her maternal grandparents, Hilton and Inell Walker.

6. Minn. Stat. §259.28, Subd. 2, does not offend any provision of the Constitution of the United States.

7. Minn. Stat. §259.28, Subd. 2, does not conflict with Federal law set forth in 42 U.S.C. §2000d or in 45 CFR part 80.

ORDER

IT IS HEREBY ORDERED:

1. That Daniesha Lofgren be placed for adoption in the home of Inell and Hilton Walker.

2. That said placement be supervised by the Department of Social Services in Halifax County, Virginia, in cooperation with the Hennepin County Bureau of Social Services.

3. That the move of Daniesha Lofgren from her foster home to her adoptive home shall be accomplished with due consideration for the child's welfare, in accordance with a transition plan to be ordered by this Court after full deliberation with all parties.

4. That this Court shall reconsider the granting of Hilton and Inell Walker's Petition for Adoption of Daniesha after the child has lived three months in their home pursuant to Minn. Stat. §259.27, Subd. 4.

5. That the attached Memorandum is hereby incorporated into this Order by reference.

April 19, 1991
Date

/s/_____
Isabel Gomez
Judge of District Court
Juvenile Division

MEMORANDUM

This Court has read and re-read counsels' briefs and written arguments. It has studied the statutes directly applicable here, as well as statutes cited in various briefs and statutes about how to construe statutes. It has read some forty state and federal cases, and it has pondered over several of them. Everything considered, it appears that, just as the facts proven at trial strongly support adoptive placement of Daniesha Lofgren with her grandparents, so does the law strongly support that placement.

Each legal issue raised in this case has been thoroughly briefed. Because some issues are easily resolvable along the lines set forth in the briefs, and because it is so important to Daniesha's welfare and to achieving real justice in this case that it be resolved as expeditiously as is consonant with thoughtful consideration of all parties' interests, the Court will forego the professional satisfaction of proving its diligence by covering in this memorandum every legal issue argued by counsel. The Court's comments are limited to those areas most fiercely litigated and most central to the case's determination.

I. The Instant Case Was Tried and Decided on the Relative Preference Set Forth in Minnesota Statute §259.28, Subd. 2.

The law applied by this Court in determining the adoptive placement for Daniesha Lofgren reads, in pertinent part, as follows:

> Subd. 2. Protection of heritage or background. The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due

consideration of the child's minority race or minority ethnic heritage in adoption placements. For purposes of intercountry adoptions, due consideration is deemed to have occurred if the appropriate authority in the child's country of birth has approved the placement of the child.

In the adoption of a child of minority racial or minority ethnic heritage, in reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to *(a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to* ... (The statute goes on to set forth two additional preferences, for same-race placement, and for placement with different-race parents who are "knowledgeable and appreciative of the child's racial or ethnic heritage.")

Minn. Stat. §259.28, Subd. 2

It must be emphasized that this Court decided that Daniesha Lofgren's maternal grandparents are her proper adoptive parents pursuant to the relative placement preference set forth above. The facts proven at trial established clearly that there is no "good cause" not to prefer the Walkers, and that it would not be "detrimental" to the child to be adopted by them. That is, it is clear that a child-parent relationship with the Walkers has not had a "demonstrated actual injurious impact" on Daniesha; and there is no "substantial likelihood that actual harm will occur" to her in the future because of her child-parent relationship with them. *Matter of the Welfare of M.M.*, 452 N.W.2d, 236,239 (Minn. 1990).

This Court was guided in applying §259.28, Subd. 2, to the facts here by the unanimous Minnesota Supreme Court decision written by Justice Coyne in the *M. M.* case,

cited *supra*. In that case, the Supreme Court construed an almost identical placement preference set forth in Minn. Stat. §260.181, Subd. 3, concerning legal custody or guardianship.

Like that in Minn. Stat. §260.181, Subd. 3, the relative preference in Minn. Stat. §259.28, Subd. 2, merely codifies a common-law preference for relatives as custodians of children whose birth parents cannot care for them. That preference has long been established in Minnesota outside of the adoption statutes. See *State ex. rel. Waldron v. Bienek*, 193 N.W. 452 (Minn. 1923).

The relative preference arises partly out of the commonsense recognition "that those near of kin will be disposed to do more for (a child's) interests than those who lack the prompting of kinship." *State ex. rel. Waldron v. Bienek*, at 452. We know that relatives shape the part of an individual's identity that is based on family history and culture; that we all find precursors and mirrors and shadows of our personal traits in birth relatives; that we are chastened, inspired, and consoled by the examples our kin provide; that, given genetic medicine, links to blood relatives can become lifelines. It is in no way surprising that, throughout the statutes dealing with placement of children, "the legislature has strongly endorsed the societal goal of strengthening and preserving the biological familial structure" by preferring relative placements. *Matter of the Welfare of M.M.*, at 238.

II. Petitioners Have Not Defined How Minnesota Statute §259.28, Subd. 2, Violates Any Legally Cognizable Right of Theirs.

Intervenors' argument that the Petitioners lack standing to make their constitutional challenges is persuasive. At least, it is true that the Petitioners' unfocussed, scattershot raising of so many miscellaneous

arguments about race arises out of the fact that they have not defined themselves a position.

The Petitioners cannot allege fairly that they were disadvantaged by a preference for same-race adoptive parents, because the racial preference was not reached here. This case was decided on the relative preference.

The Petitioners suggest that there is something pernicious about Minnesota law's taking particular concern with minority-race children in §259.28, Subd. 2. Certainly, they have no standing to raise this argument. Daniesha (by her Guardian ad Litem) could do so, as a minority child. But one may not challenge the constitutionality of a law by alleging that the rights of a third party have been violated. See *Hughes v. Patrick & Assocs.*, 220 N.W.2d 347 (1974).

Petitioners suggest that they would be entitled to have their Petition for Adoption considered before the Walkers' Petition could be considered, if it were not for Minn. Stat. §259.28, Subd. 2. This is simply untrue. Even without the statute, the Walkers would be preferred, because they are relatives. See *Matter of the Welfare of M.M.*, 452 N.W.2d 236 (Minn. 1990).

This Court has "broad discretion" to "determine rights in an adoption proceeding in accordance with the best interests of the child ...." Petition of Jordet, 80 N.W.2d 642,646 (1957). The rules applicable to this matter specifically allow the Court to "order a separate trial of one or any number of claims, cross-claims, counterclaims, or third-party claims, or of any separate issues." Minn. Rules of Civil Procedure 42.02. Since it is clear that Minnesota law does prefer relatives for adoptive placement of any child, this Court might well have heard the Walkers' petition first, even without §259.28, Subd. 2.

Assuming that the Court would have heard the Walkers' and the Sharps' petitions at the same time, or even that it would have heard the Sharps' petition first, the

Petitioners have cited no authority to support the proposition that they have any constitutionally-protected right to have issues tried in a particular order. In trying to weigh fairly whether Petitioners were in fact disadvantaged by the order of trial in this matter, this Court has found no way in which they were disadvantaged. Petitioners have not set forth how they were disadvantaged. Indeed, they were able to put forth their strongest evidence (expert testimony that a move would hurt Daniesha), exhaustively attack the Walkers' suitability as adoptive parents, and avoid similar attacks on themselves.

III. Minnesota Statute §259.28, Subd. 2, is Remedial in Nature and Probably Need Not Be Reviewed Under the Strict Scrutiny Standard.

Testimony at trial showed, and it is undisputed, that prior to the 1988 amendments to the framework of laws relating to the foster placement, adoptive placement, and custody of children, 80% of Minnesota's Afro-American children not living with their birth parents were placed by state and private agencies in non-relative, non-Afro-American homes.

It has long been recognized, and is undisputed here, that it is highly desirable for children to be raised by adults who are like them racially. It has never been controversial, or in any way problematical, to place children with people who are of their race. What we have debated is whether children can also be healthy and happy with parents who are different from them racially.[1] *See*

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[1] The third preference of §259.28, for different-race adoptive parents who are sensitive to the child's racial/ethnic heritage, shows that Minnesota's legislature thinks children can be well-raised in interracial adoptive homes.

the thoughtful discussion of race issues in adoption in Chief Judge Newman's Opinion, *In the Matter of the Petition of R.M.G. and E.M.G.*, 454 Atlantic Reporter 2d 776, at 796 *et seq* (D.C. App. 1982).

The 80% non-Afro-American placement rate to which Minnesota's Afro-American children were until recently subjected, is all too close to the 90% non-Indian placement rate that led to the passage of the Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §§1901-1963. *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597 (1989), at 1600. Minn. Stat. §259.28 is patterned after the Indian Child Welfare Act, and it is designed to address the same concerns. Those are, first, that a particular group of children – here, Afro-American – was being disproportionately denied the advantages of being raised by relatives, or in a same-race home; and, second, that a particular racial group – here, Afro-American – was suffering a disproportionate draining-off of the children who constitute that group's future. See *Holyfield*, 109 S. Ct. 1597, at 1600-1602.

Minn. Stat. §259.28 is designed, in the clear language of the law itself, to "ensure that the best interests of children are met by requiring due consideration of the child's minority race ..." Since it addresses substantial problems arising out of the realities that Minnesota is more than 90% white in its racial make-up and that most of the people making placement decisions (including this Court) are white, the statute is likely not subject to the strict scrutiny analysis of constitutionality. *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2795 (1980).

IV. Minnesota Statute §259.28, Subd. 2, Meets the Strict Scrutiny Test for Constitutionality.

If, by any means, it is found that the Petitioners' claims trigger strict-scrutiny analysis of Minn. Stat.

§259.28, Subd. 2, it appears to this Court that the law withstands such analysis.

Under the strict scrutiny test, it must be shown that the consideration of the child's minority race mandated by §259.28, Subd. 2, is necessary to promote a compelling governmental interest and necessary to accomplish that legitimate purpose. *Regents of the University of California v. Bakke*, 438 U.S. 265, 290-91 (1978); *See also Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

The compelling governmental interest here is the best interests of the child in question, and the

> "goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."

Palmore v. Sidoti, 466 U.S. 429, 433.

The notion that consideration of the child's blood relationships and/or race is a legitimate means to promote the best interests of a minority child has been found to withstand strict scrutiny in several cases. *See J.H.H. and S.C.H. vs. O'Hara*, 878 Fed. 2d 240 (8th Circuit, 1989); *Petition of D.I.S. for the Adoption of S.A.O.*, 494 Atlantic 2d 1316 (D.C. App., 1985; *Petition of R.M.G. and E.M.G.*, 454 Atlantic 2d 776 (D.C. App., 1982); *Drummond v. Fulton County Department of Family and Children's Services*, 563 Fed. 2d 1200 (5th Circuit, 1977); *Compos v. McKeithen*, 341 Fed. Supp. 264 (1972).

We have found no case in which a Court has deemed it constitutionally impermissible to consider race as one of the factors bearing on adoption. Only when race is the sole factor considered by the Court in making a placement decision is there a constitutional violation. The statute at issue here never allows a trial court to consider race alone

as the test which determines adoptive placement:[2] it requires the trial court to consider a whole network of factors. Any tendency this statute has

> "to reduce the number of interracial families is purely incidental to a non-racial, non-separationist purpose; to promote the best interest of each adopted child."

Matter of the Petition of R.M.G. and E.M.G., 454 Atlantic 2d 776, 801 (D.C. App., 1982).

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2 The Hennepin County Juvenile Court has this year placed several children of color with white parents after there had been due consideration of the statutory preferences, or pursuant to a birth parent's waiver of same-race placement. Petitioners' statistics cover only the placements done by one agency – the Hennepin County Adoption Unit, not all placements under the statute.

STATE OF MINNESOTA DISTRICT COURT
IN COURT OF APPEALS

C7-91-1173

IN THE MATTER OF THE
WELFARE OF: D.L.

OPINION

DAVIES, JUDGE
DISSENTING, SCHUMACHER, JUDGE

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Filed December 31, 1991
Office of Appellate Courts

SYLLABUS

1. By limiting mandatory placement preferences to children of minority racial or ethnic backgrounds, the Minority Adoption Act, Minn. Stat. §259.28, subd. 2, violates the 14th Amendment's Equal Protection Clause.

2. Longstanding legislation and common law preferences for placing a child in the permanent care and

custody of a relative should be considered in support of a relative's petition for adoption of a child.

Affirmed.

Considered and decided by Schumacher, Presiding Judge, Klaphake, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

D.L.'s foster parents and maternal grandparents both sought to adopt her. The foster parents appeal the trial court's ruling granting the grandparents' petition. We affirm.

FACTS

D.L., whose birth date is July 12, 1989, was the third child born during the marriage of Debra L. and Jonathan L. D.L. has been in the care of appellants, her foster parents, since a few days after her birth. D.L., Debra, and the respondent grandparents are African-American; the foster parents and the father are not.

Debra did not give any information about her family to the agency that placed D.L. with appellants. She gave the agency a false address and failed to keep appointments with the agency social worker. Debra and Jonathan's parental rights to D.L. were terminated by the trial court's order on August 15, 1990, on the ground of abandonment.

Debra's two other daughters have lived with her parents, respondents herein, since 1988. One of the daughters is from the marriage with Jonathan and the other from a prior relationship. Respondents have legal custody of both girls, now six and eight years old. Another child of the marriage, a boy, lived with them for a time.

At the request of both the boy and his father, respondents returned the boy to Jonathan.

Respondents live in rural Halifax County, Virginia. They first learned of D.L.'s existence in August of 1989 when Debra called from Minnesota and told them she had a daughter. Debra refused to give her parents any further information or a telephone number where she could be reached.

Debra visited respondents for a few days in late December 1989. They urged her to get the baby and live with them. Debra, however, returned to Minnesota and respondents had no contact with her until February of 1990, when they learned she was in jail in Minneapolis. Respondents called Debra who assured them that D.L. was with good people and she would get her back.

In June 1990, Debra called her mother to say for the first time that if she could not get out of jail, she was going to lose D.L. Promptly thereafter, respondent grandmother came to Minneapolis to look for D.L.; she was able to locate her granddaughter through the placement agency. Within a few weeks respondents notified Hennepin County's adoption unit that they wished to adopt D.L.

Initially, Hennepin County advised respondents they could assume custody and take D.L. back to Virginia with them after a short transition period. However, on October 5, appellants, D.L.'s foster parents, filed a petition to adopt D.L. By order dated October 12, the trial court granted a temporary restraining order to prevent D.L.'s immediate removal from appellants' home.

On November 5, the trial court granted respondents' motion to intervene in the adoption proceeding initiated by appellants. Then on November 14, 1990, respondents filed their own petition to adopt D.L. An evidentiary hearing was set for January 1991. Prior to trial, the court issued an order limiting the hearing to the issue of

whether there was good cause not to approve respondents as D.L.'s adoptive parents under the "relative" preference of the Minority Adoption Act, Minn. Stat. §259.28, subd. 2.

At the seven-day trial, respondents provided a detailed description of their background, marriage, and family life. Respondent grandfather was age 51 and respondent grandmother was age 48 at the time of trial. They have been married since 1962. Both are in good health and are normally employed full time. The grandmother testified that she took a leave of absence from her job to pursue D.L.'s adoption and that she planned to stay at home to care for D.L. if the petition was granted.

Sandra Lawson, a Hennepin County social worker, testified pertaining to her favorable study of respondents' home. Lawson's testimony regarding the positive relationship between respondents and their children and grandchildren was confirmed by D.L.'s guardian ad litem, Jane Moore, who also visited respondents in Virginia.

We turn now to the appellants. They testified they have been married since 1966. Except for a teenage son, appellants' children are married and living away from home. Appellants testified they have a profound love for D.L. and that D.L. is deeply attached to them. A primary issue at trial was the consequences to D.L. of breaking the emotional bond between her and appellants.

Appellants presented the testimony of clinical psychologists, Drs. Winifred Scott and Clifford Moore; a pediatrician, Dr. Jeffrey Alexander; and a professor of child psychology at the University of Minnesota, Dr. Byron Egeland. These experts testified that removing a child of D.L.'s age from caretakers to whom the child is securely attached will cause permanent harm to the child which may result later in depressive or conduct disorders. All the experts agreed that a child D.L.'s age would

experience short-term pain if the attachment with the primary caretaker was disrupted.

Respondents' primary expert was Kenneth Watson, a licensed clinical social worker and the Assistant Director of the Chicago Child Care Society. Watson testified he has been involved in thousands of adoptions involving toddler-aged children in his 37 years of experience. He stated that although children feel great pain if removed from caretakers to whom they are securely attached, the likelihood that the child will suffer any significant emotional problems is extremely small, given a loving recipient family. Watson testified about the advantages to the child of placement within the biological family. He also testified that African-American parents have a unique ability to pass along to their children the coping skills needed for a minority person to manage in this society.

Respondents also called Dr. Lawrence Kutner, a clinical psychologist, as a rebuttal witness. Kutner testified that although attachment is important, the impact of early separation can fade away with the opportunity to form new positive attachments.

The trial court granted respondents' adoption petition, making extensive findings of fact. The court upheld the constitutionality of the Minority Adoption Act and found there was no good cause not to follow the relative placement preference of the Act. The court also made a separate finding that it was in D.L.'s best interest that respondents become her adoptive parents.

This appeal followed. Pursuant to orders of this court, D.L. has remained in appellants' home during the pendency of the appeal.

ISSUES

1. Does the Minority Adoption Act, Minn. Stat. §259.28, subd. 2, violate the 14th Amendment's Equal

Protection Clause by limiting mandatory placement preferences to children of minority racial or ethnic backgrounds?

2. Did the trial court abuse its broad discretion in concluding that the child's best interests were served by placing her for adoption with her maternal grandparents?

ANALYSIS

The trial court's authority to grant an adoption petition is governed by Minn. Stat. §259.28 (1990). The statute provides that a decree of adoption shall be made if the court finds that it is in "the best interests of the child." Minn. Stat. §259.28, subd. 1(a).

I.

The Minority Adoption Act, codified at Minn. Stat. §259.28, subd. 2, requires the court, in the absence of good cause to the contrary, to follow certain placement preferences in the adoption of a child of "minority racial or minority ethnic heritage." *Id.* In determining adoptive placement of such children, the court "shall" give preference first to a relative of the child, or, if that would be "detrimental" to the child or a relative is not available, to a family with the same racial or ethnic heritage as the child. *Id.* If such a placement is not "feasible," the court shall give preference to a family of different racial or ethnic heritage from the child that is "knowledgeable and appreciative" of the child's racial or ethnic heritage. *Id.*

Appellants contend that Minn. Stat. §259.28, subd. 2, impermissibly classifies adoptive children based upon their race, thereby violating the 14th Amendment's Equal Protection Clause. Appellants are joined in this argument by D.L.'s guardian ad litem and amicus curiae Suburban NAACP. Respondents grandparents and Hennepin County contend that appellants lack standing to challenge

the statute and further argue that the statute withstands equal protection strict scrutiny analysis.

To invoke the jurisdiction of the court, when the constitutionality of a statute is challenged, the litigant bringing the challenge must be able to show that the statute has been or is about to be applied to his or her disadvantage. *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977). In this case, appellants were aggrieved by the trial court's application of the relative preference under Minn. Stat. §259.28, subd. 2. We find appellants have standing to challenge the constitutionality of the statute.

A core purpose of the 14th Amendment is to do away with all governmentally imposed discrimination based on race. *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879 (1984). To pass constitutional muster, racial classifications are subject to the most exacting scrutiny, that is, they must be justified by compelling governmental interest and must be "necessary * * * to the accomplishment" of their legitimate purpose. *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290-91 (1964). The "strict scrutiny" test applies even to "benign" or "remedial" race-based classifications prescribed by state and local governments. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91, 109 S.Ct. 706 (1989).[1]

On its face, Minn. Stat. §259.28, subd. 2, establishes a racial classification by requiring, in the adoptive placement of a child of minority racial or ethnic heritage, that the trial court follow certain preferences not required

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1 Race-conscious classifications adopted by *Congress* to address racial and ethnic discrimination are subject to a more lenient standard – they must only serve an important governmental objective and be substantially related to the achievement of that objective. *Metro Broadcasting, Inc. v. FCC*, ___ U.S. ___, 110 S.Ct. 2997, 3009 (1990).

for non-minority children. The statute recites a benevolent purpose for the classification, that is, "to ensure that the best interests of children are met by requiring due consideration of the child's minority race or minority ethnic heritage." *Id.*

The racial classification here fails, however, because it is not necessary to the accomplishment of the legislative purpose. The heritage of minority children can be protected without the classification by making the preferences for relatives applicable to *all* children, as the legislature has directed in related statutes. *See, e.g.,* Minn. Stat. §259.255 (child placing agency shall give preference to relatives in placing "the child" in adoption placements); Minn. Stat. §260.181, subd. 3 (court shall follow preferences for relatives in transferring legal custody of "any child").

We are mindful that this court exercises the power to declare a statute unconstitutional only when absolutely necessary. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989). In assessing the constitutionality of a racial classification, we must consider the availability of an alternative remedy. *Croson*, 488 U.S. at 507. Because giving the relative racial preferences in the adoption of all children would achieve the same result in a racially neutral manner, we find that restriction of these preferences to children of minority racial and ethnic background alone as specified under Minn. Stat. §259.28, subd. 2, is unconstitutional under the 14th Amendment's Equal Protection Clause.

II.

The trial court's decision to grant an adoption petition is reviewed under an abuse of discretion standard. *In re Jordet*, 248 Minn. 433, 443, 80 N.W.2d 642, 648 (1957).

In view of our decision that the Minority Adoption Act is unconstitutional, respondents are not entitled to a mandatory preference under that statute. There is, however, both longstanding common law which favors providing "custodial preference to near relatives," *In re M.M.*, 452 N.W.2d 236, 238 (Minn. 1990), and a strong legislative policy of awarding "the permanent care and custody" of a child to a relative. *Id.; see* Minn. Stat. §257.02 (1990). The legislature has emphasized the importance of preserving the biological family, *see* Minn. Stat. §256F.01 (1990), and, if necessary, transferring legal custody or guardianship to a relative, Minn. Stat. §260.181 (1990).

Basically the same language regarding a preference for relatives which appears in Minn. Stat. §260.181, dealing with custody or guardianship, appears in Minn. Stat. §259.255 (1990), which deals with the duties of the child placement agency in an adoption. While both of these statutes contain purpose clauses which mention concern for minority race and ethnic heritage, the operative language of each is neutral and refers to "placing the child with * * * a relative," Minn. Stat. §259.255, or placing "the child * * * in the legal custody or guardianship of * * * [a] relative," Minn. Stat. §260.181. The purpose clauses do not make the operative language of these two provisions invalid.

Our supreme court has recognized a common law doctrine which, although not as compelling as the right of a parent to custody of a child, accords a custodial preference to other near relatives, as opposed to strangers. *In re M.M.*, 452 N.W.2d at 238. This is based on the common sense notion that those near of kin will be disposed to do more for the welfare of the child and to advance his or her interests than those who lack the prompting of kinship. *State, ex rel. Waldron v. Bienek*, 155 Minn. 313, 315, 193 N.W. 452, 452-53 (1923).

Appellants and the dissent argue that there is no preference under the common law for *adoptive* placement with near relatives. This is understandable, for legal adoption is wholly statutory and was unknown to the common law. *See In Re Kure*, 197 Minn. 234, 236, 266 N.W. 746, 747 (1936). Appellants also point out that our supreme court has affirmed a trial court's order granting the foster parents' petitions to adopt and denying the maternal grandmother's petition. *In re Niskanen*, 301 Minn. 53, 223 N.W.2d 754 (1974).

In a subsequent decision, however, the court noted *Niskanen* as an exception to "the traditional preference to be accorded prospective custodians who are also blood relatives of the child." *In re Doege*, 308 Minn. 104, 109, 240 N.W.2d 562, 564 (1976). The same reasons underlying the common law preference for near relatives as custodians apply with at least equal force when the question becomes one of appropriate placement for adoption.

It is clear from the cumulative legislation addressing child custody, that "the legislature has strongly endorsed the societal goal of strengthening and preserving the biological family structure." *In re M.M.*, 452 N.W.2d at 238. Further, an award of custody to a relative enhances his or her ability to prevail in a subsequent adoption proceeding. Thus, by codifying the common law *custodial* preference for near relatives, the legislature could be said to have indicated that the biological family is also favored for *adoptive* placement. *See id.* (strong preference to award permanent care and custody of a child to a relative if natural parents are unable to perform that responsibility).

The circumstances here illustrate why courts and legislatures have had little reason to make more explicit the adoptive preference for relatives that common sense suggests. The mother here voluntarily turned over to her parents the two older siblings for long-term custody (or de

facto adoption). The occasion for a termination of her parental rights to those children and their placing for adoption thus never arose.

In fact, the record indicates the issue would not have arisen in this case had appellants not filed their petition for adoption. Hennepin County had advised respondents that they could assume custody and take D.L. to Virginia with them. Only at that point did appellants file a petition for adoption and only after that did respondents file their own petition to adopt D.L.

Further, independent of the preference in Minn. Stat. §259.28, subd. 2, which we find unconstitutional, the appropriate test for a proposed adoptive placement is whether it would serve "the best interests of the child." Minn. Stat. §259.28, subd. 1(a). We are able to affirm the result in this case because the record supports the trial court's separate independent conclusion that D.L.'s adoptive placement with her grandparents is in her best interest.

Appellants urge that the removal of D.L. from their care will permanently harm her because of the disruption of the primary caretaker bond. The experts agreed, and the trial court found, that D.L.'s separation from appellants will cause her severe short-term pain. Based on the testimony of Kenneth Watson, however, the trial court found that the injury will heal well in the loving environment provided by the grandparents. We cannot say the trial court abused its discretion in resolving the conflicting expert testimony on this issue. *See In re J.M.G.*, 376 N.W.2d 494, 498 (Minn. App. 1985), *pet. for rev. denied* (Minn. Jan. 17, 1986) (where opinions of experts conflict, the finder of fact is to determine the more credible and acceptable view).

We recognize the importance for young children of maintaining continuity with the primary caretaker. *See Maxfield v. Maxfield*, 452 N.W.2d 219, 223 (Minn. 1990)

(child's bond with the primary parent should not be disrupted without strong reasons). In other contexts, however, the severance of such a bond has not been held to be the overriding consideration in determining the best interests of the child. *See Wallin v. Wallin*, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971) (disruptive effect of custody change not sufficient to prevent parent from prevailing in custody dispute with nonparent); *State, ex rel. St. Louis County Welfare Dept v. Niemi*, 284 Minn. 225, 232, 169 N.W.2d 758, 762 (1969) (painful transition from foster parents to natural parents may be compensated by ultimate benefit for the child in growing up in the natural family).

In summary, the trial court, in this unusual circumstance, properly should consider statutes related both to adoption and to transfer of legal custody and the common law preference for maintaining the child within the biological family in determining whether to grant an adoption petition. In this case, the record supports the trial court's findings of significant benefits to D.L. from placement with her grandparents. These include the opportunity to grow up with her two siblings and the support of a closely-knit extended family. We cannot say the trial court erred in concluding that the temporary pain D.L. will suffer due to her separation from appellants is outweighed by the long-term advantages of placement in the grandparents' home.

III.

Appellants raise three other issues that require brief discussion.

1. Appellants argue the trial court erred in refusing to consider their petition, even though it was filed prior to the grandparents' position. We disagree.

Minnesota Statutes, chapter 259, does not provide specifically that the court may accord one adoption

petition a procedural preference over a competing petition. Still, adoption statutes are to be liberally construed to accomplish their purpose, and there need not be more than a substantial compliance with their requirements to sustain validity of the adoption proceedings. *Jordet*, 248 Minn. at 439, 80 N.W.2d at 646. The trial court has discretion to focus on the more likely petition in the interest of avoiding a lengthy and contentious proceeding. *See* Minn. R. Civ. P. 42.01 (when actions involving a common question of law or fact are pending before the court, it may make such orders concerning proceedings therein as may tend to avoid unnecessary cost or delay).

2. In their post-trial motions, appellants argued they were entitled to a new trial because of trial court bias. This claim is based primarily on an opinion piece written by the trial judge for a local newspaper pertaining to the difficulties white Minnesotans have in understanding other cultures.

A judge may not preside in a case if he or she has an interest in its determination or if he or she might be excluded for bias. Minn. R. Civ. P. 63.02. Bias or prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from her participation in the case. *In re Estate of Lange*, 398 N.W.2d 569, 573 (Minn. App. 1986). Here, the trial judge's general comments in the newspaper article were unrelated to the merits of this case. The record does not sustain a determination of bias warranting a new trial.

3. Appellants also argue the trial court erred in allowing the surprise rebuttal testimony of Dr. Kutner. This testimony was cumulative, however, and its rejection would not have affected the outcome. The trial court did not abuse its discretion in denying a new trial on this ground. *Sward v. Nash*, 230 Minn. 100, 109, 40 N.W.2d

828, 833 (1950) (new trial should be granted only if there is a strong probability that it will render a different result).

IV.

In an order dated April 24, 1991, this court stayed transfer of D.L. from appellants' home until final resolution of all trial court and appellate proceedings. Respondents' request to rescind the stay at this time is denied. The stay remains in effect until this court's decision becomes final. *See* Minn. R. Civ. App. P. 136.02

DECISION

By imposing different criteria for adoptive placement of children of minority racial or ethnic backgrounds, as opposed to non-minority children, Minn. Stat. §259.28, subd. 2, violates the 14th Amendment's Equal Protection Clause. Although application of the relative preference under the statute was impermissible, we affirm the result in this case based on longstanding legislative and common law preferences for placing a child in the permanent care and custody of a relative and on the trial court's separate conclusion that the child's best interests are served by placement with her grandparents. The trial court did not abuse its broad discretion in concluding that the temporary harm to D.L. resulting from her separation from appellants is outweighed by the significant benefits of placement within her biological family.

Affirmed.

December 23, 1991 /s/_____
Date Jack Davies

SCHUMACHER, Judge (dissenting).

I agree that Minn. Stat. §259.28, subd. 2 creates an impermissible racial classification and is unconstitutional. I disagree with the majority's affirmation of the result in this case on the ground that the trial court conducted an alternate "best interests" analysis. In fact, the proceedings were limited to whether there was "good cause" not to apply the relative preference under the statute we have now found unconstitutional. Because the trial court's refusal to consider appellants' petition resulted in the exclusion of certain evidence and the skewing of the weight afforded to other evidence, a new trial is necessary. I therefore respectfully dissent.

1. The majority concludes the trial court acted within its discretion in choosing to entertain only the petition of respondent grandparents. I disagree. In this case, appellants' petition was filed first. The grandparents were allowed to intervene in the proceeding to consider *appellants'* petition. Despite this posture, the trial court issued an order only a few days before trial limiting the evidence to the issue of whether there was good cause not to grant the *grandparents'* petition.

By preliminarily barring evidence in support of appellants' petition, the trial court rendered it impossible to make a reasoned determination of D.L.'s best interests based on all of the relevant evidence. Moreover, the trial court's focus on whether there was good cause not to place D.L. with her grandparents may well have affected the court's evaluation of critical evidence on the effect of the disruption of the primary caretaker bond. The experts agreed that D.L. will be psychologically damaged if removed from appellants' care, but disagreed as to the likelihood of long term damage. The evidence respondents presented that D.L. will not be permanently

harmed would be of less weight in an inquiry where her best interests is the only issue.

2. Further, I disagree with the majority's conclusion that there is a "common law" preference for near relatives in adoption proceedings. The power to decree an adoption is purely statutory and the statute is the measure of the court's authority. *In re Jordet*, 248 Minn. 433, 439, 80 N.W.2d 642, 646 (1957). Without statutory authorization, no preference for near relatives may be applied.

The majority seeks to extend the common law preference *for near relative placement in custody proceedings* to adoption proceedings. The common law custody preference fostered the goal of preserving the family unit while parental rights continued. The adoption statute, by contrast, seeks to provide a permanent family relationship for children only after the biological parents' rights have been terminated. To achieve this purpose, the act severs all biological relationships and creates a new parent / child relationship with a new family and new relatives. *See* Minn. Stat. §259.29, subd. 1 (1990).

Accordingly, our supreme court has not recognized a near relative preference in adoption proceedings. *See In re Niskanen*, 301 Minn. 53, 55, 223 N.W.2d 754, 756 (1974) (in adoption contest between foster parents and grandmother, no presumption such as that in favor of a natural parent is applicable to any of the petitioners, since parental rights have been terminated). The majority's attempt in this case to construct a nonstatutory relative adoptive preference is contrary to the clear import of *Niskanen*.

In summary, the trial court explicitly limited the proceedings here to the issue of whether the statutory relative preference should apply. Our determination that the standard on which the trial court relied is unconstitutional compels a remand for consideration

under a true "best interests" standard. Although I recognize the need for certainty for D.L., the importance of determining her permanent home based on *all* the relevant evidence and according to the proper standard justifies the delay that would be caused by further proceedings. I would reverse and remand for a new trial.

December 23, 1991 /s/_____
Date Robert H. Schumacher

STATE OF MINNESOTA DISTRICT COURT
IN SUPREME COURT

C7-91-1173

IN THE MATTER OF THE
WELFARE OF D.L.

OPINION

GARDEBRING, J.
COURT OF APPEALS

Filed June 12, 1992
Office of Appellate Courts

SYLLABUS

1. In adoptions, the best interests of a child presumptively are served by placement with relatives unless good cause to the contrary or detriment to the child are shown.

2. Where there are alternative petitions for adoption, and only one petitioner qualifies for the presumption in favor of family placement, it is within the trial court's discretion to consider that petition separately, so long as the court allows the other petitioners to participate in the proceedings.

3. The temporary restraining order barring the removal of D.L. from her foster home is lifted, effective ten days after the date this opinion is filed.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case involves the adoption of 2-year-old D.L., who has lived with her foster parents since four days after her birth in July 1989. The foster parents and D.L.'s maternal grandparents both filed petitions to adopt the child after the parental rights of D.L.'s natural mother and father were terminated. The trial court granted the grandparents' petition, based on the family preference for adoption of minority children expressed in Minn. Stat. §259.28, subd. 2 (1990).[1] The court of appeals held the statute unconstitutional, but affirmed the trial court's result, based on a common-law preference for family placements. *In re D.L.*, 479 N.W.2d 408, 412-15 (Minn. App. 1991).

The briefs and oral argument in this case reflect careful legal research and thoughtful analysis. But the

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1 Under Minn. Stat. §259.28, subd. 1(a), an adoption decree shall be granted "if the court finds that it is in the best interests of the child." Minn. Stat. §259.28, subd. 2(1)(a). Subdivision 2 provides in pertinent part:

> The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due consideration of the child's minority race or minority ethnic heritage in adoption placements. * * *
>
> In the adoption of a child of minority racial or minority ethnic heritage, in reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage a the child * * *.
>
> Minn. Stat. §259.28, subd. 2

court is also mindful that this is not a case about the meaning of an insurance policy or the interpretation of a statute; it is about a child, much loved by two families, each prepared to raise her with care and devotion, one of whom will be enriched and delighted by her presence in their home, and the other of whom will be deprived of the joy she gives. As a court, we must be guided by abstract legal principles, but in this case, we have attempted to apply the wisdom of our hearts, as well.

We affirm the decisions of the lower courts, and conclude that D.L. be placed for adoption in the home of her grandparents, consistent with the order of the trial court of April 19, 1991. We do not reach the constitutional issue because, whether or not the particular scheme of Minn. Stat. §259.28 is valid, a strong preference for family placement is well established in Minnesota law. The touchstone of our analysis, as always, is the best interests of the child, and consistent with that principle, we hold today that adoptive placement with relatives is presumptively in a child's best interests, unless good cause to the contrary or detriment to the child are shown.

D.L. was born July 12, 1989, the daughter of an African-American mother. D.L.'s parents separated in 1988. Shortly thereafter, D.L.'s mother left her other three children with her parents in Virginia. D.L.'s mother returned to Minnesota and maintained only sporadic contact with her parents thereafter.

At birth, D.L. was released by her mother to a foster care and adoption agency. Four days later, D.L. was placed with her foster parents, who are Caucasian. The placement agency was unable to find D.L.'s extended family because the mother provided false information and did not maintain contact with the agency. In September 1989, D.L.'s grandparents, who are African-American, first learned that D.L. had been born and placed in foster care. The child's mother refused to provide any further

information to them. In February 1990, the grandparents learned that D.L.'s mother was in jail in Minneapolis. In July 1990, D.L.'s mother told her parents that she was in danger of losing custody of D.L. D.L.'s grandmother came to Minnesota, determined her whereabouts and made inquiries to a foster care social worker about seeing the child.

On August 16, 1990, the Hennepin County Juvenile Court terminated the parental rights of D.L.'s mother and father. The child became a ward of the state and remained in the custody of the foster parents. The child's grandmother indicated to county social workers that she and her husband wanted to adopt D.L. The county began to develop a permanent placement plan for D.L., and determined that they should try to place her with her grandparents, in compliance with the preference expressed in Minn. Stat. §259.28, subd. 2. Upon learning that D.L.'s grandmother was seeking to take the child back to Virginia, the foster parents sought and received a temporary restraining order. The trial court found that the county had not adequately considered whether moving D.L. would needlessly disrupt her attachment to her foster parents when her ultimate placement was uncertain.

On October 5, 1990, the foster parents filed a petition to adopt. The grandparents filed their petition on November 8, and were granted reasonable visitation with the child. With the assistance of the county, they began visiting the child frequently. Hennepin County social workers, along with their counterparts in Virginia, conducted a study of the grandparents' home, and recommended that the grandparents' adoption petition be granted. The trial court invoked Rule 42.02, Minn. R. Civ. P.[2] to consider the grandparents' petition first, reasoning

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2 The rule provides: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of one or any

Footnote 2 continued on next page

that only if it found good cause not to follow the statutory family preference would it need to reach other issues; thus the only issue litigated was whether there was good cause not to invoke the preference. The foster parents were allowed to participate in the proceeding as intervenors, but their role was limited to presenting evidence on the issue of good cause.

At trial, the evidence showed that the grandparents are in good health and that their home life is financially and emotionally stable. The evidence further showed that the grandparents have six children, two of whom remain at home: a 17-year-old daughter and a 9-year-old son. The grandparents also have legal and physical custody of D.L.'s sisters. D.L.'s brother is presently living with his father.

The key issue at trial was the severity of any trauma D.L. might experience by being moved from the foster home to her grandparents' home. All six experts testified that breaking the bond that has developed between D.L. and her foster parents would cause some harm because they are the only parents D.L. has known. However, there was disagreement among the six experts as to the permanency of the harm. The experts testifying on behalf of the grandparents indicated that any damage would be temporary and that the child's sense of loss would diminish as new attachments are formed.

The trial court credited that view and found, among other things, that the trauma of breaking the primary attachment is temporary and heals well in most cases; that the trauma of being moved from one good home to another is likely to be reflected in the child's conduct for up to 180 days; that a child who has formed a healthy attachment to a primary caretaker is likely to be able to

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Footnote 2 continued from previous page

number of claims, cross-claims, counterclaims, or third-party claims, or of any separate issues." Minn. R. Civ. P. 42.02.

form a subsequent good attachment to a different caretaker; that the likelihood of significant emotional harm from moving a securely-attached child from one good home to another is small, and that the temporary pain of separation from the foster family does not outweigh the lifelong advantages of living with a child's natural family. The trial court concluded that there was no good cause not to apply the statutory family preference, and that it would not be detrimental to D.L. to be adopted by her grandparents. The order for adoption by the grandparents was granted on April 19, 1991. The trial court ordered that the temporary restraining order against removal of D.L. from the foster home be lifted, but the court of appeals reinstated the temporary restraining order, pending "final resolution" of the case.

On May 7, the foster parents filed a motion for amended findings, conclusions and order for judgment or a new trial, plus a motion for the trial judge to recuse, based on arguments that (1) the findings were not supported by the evidence; (2) the conclusions were not supported by law; and (3) there were irregularities which deprived appellants of a fair trial, including bias by the trial court. Particularly bothersome to appellants was a June 1990 newspaper essay[3] in which the judge wrote, among other things:

> [T]he vast majority of white Minnesotans unthinkingly accept white culture as the norm – indeed, as the whole of reality. To such radical ethnocentrics, people of color are forever too weak (they "can't" act white, i.e., "normal") or too scary (they won't act "white).

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3 Trial counsel for the foster parents submitted an affidavit in which he stated that he did not learn of the newspaper article until after trial.

> Whites who want not to be racist expend huge effort trying to be clear and fair in their understanding of people of color, so as to help colored people transform themselves into a reasonable facsimile of white people. What we really must do is see that we, in our unexamined whiteness, are the problem. We should use our energy better, use it to understand how we have constructed an American that vests unearned power and privilege in whites.

Star Tribune, June 21, 1990, at 21A, col. 2.

The trial court denied all of the appellants' post-trial motions. A divided court of appeals panel affirmed the trial court's result, though not its reasoning. *In re D.L.*, 479 N.W.2d at 412-15. All three members of the panel held the Minn. Stat. §259.28, subd. 2 violates the equal protection clause of the 14th amendment. *Id.* at 413, 416. The majority nonetheless upheld the trial court's decision on the grounds that longstanding legislative and common-law preferences for placement with family members leads to the same results. *Id.* at 413-15. The dissent contended that because adoption is a statutory invention, there is no common law of adoption. The dissent would have remanded for a new trial solely on a "best interests of the child" analysis. *Id.* at 416-17. The court of appeals also held that the trial court did not abuse its discretion in initially considering only the grandparents' petition and that the judge's newspaper essay did not reflect improper bias. *Id.* at 415.

One of the questions raised on appeal is whether Minn. Stat. §259.28, subd. 2 violates the equal protection clause of the 14th amendment by establishing a family preference only for adoption of minority children. We do not believe it is necessary to reach that issue. Statutes are

presumptively constitutional. *See State v. Hamm*, 423 N.W.2d 379, 380 (Minn. 1988); *In re Tveten*, 402 N.W.2d 551, 556 (Minn. 1987). This court's power to declare a statute unconstitutional should be exercised "only when absolutely necessary and with extreme caution." *In re Estate of Turner*, 391 N.W.2d 767, 769 (Minn. 1986).

We need not reach the constitutional issue because we conclude that a strong family preference exists for *all* child placements, without regard to race or ethnic heritage. The court of appeals majority relied on the common law of adoption. The dissenting judge and the foster parents contend that there is no such thing. That debate is semantically provocative but legally unhelpful. Adoption is a creation of statute, so there is no line of cases stretching back to 17th century England. To that extent, there is no common law of adoption. *See In re Kure*, 197 Minn. 234, 236, 266 N.W. 746, 747 (1936). But that does not mean that the courts are relegated to a passive role in adoption issues. While the power to decree an adoption is purely statutory, and the statute is the measure of the court's authority, "[a]doption statutes are to be liberally construed to accomplish their purpose, and there need not be more than a substantial compliance with their requirements to sustain the validity of adoption proceedings." *In re Jordet*, 248 Minn. 433, 439, 80 N.W.2d 642, 646 (1957). Further, it is clear that the judicial branch has an independent interest, and significant independent authority, to guard the welfare of children who are wards of the state after parental termination.

Whether or not Minn. Stat. §259.28, subd. 2 is constitutional, there is no question that subd. 1(a) is valid, and it states that adoption petitions are to be granted if doing so is in the best interests of the child. "Best interests

of the child" is not defined in the adoption statute,[4] but it is well-established in this state that the courts have independent authority to determine a child's "best interests." As we said nearly 100 years ago in a slightly different context, legislative enactments on the placement of children are not "beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant as paramount * * *." *State ex rel. Flint v. Flint*, 63 Minn. 187, 189, 65 N.W. 272, 273 (1895). For additional discussion of the courts' great interest in the welfare of children, *see State ex rel. Larson v. Halverson*, 127 Minn. 387, 389, 149 N.W. 664, 665 (1914); *In re Anderson*, 235 Minn. 192, 197, 50 N.W.2d 278, 283-86 (1951); *State ex rel. Waldron v. Bienek*; 155 Minn. 313, 315-16, 193 N.W. 452, 452-53 (1923); and *Jordet*, 248 Minn. at 441; 80 N.W.2d at 646-47.

In the courts' efforts to identify and promote the best interests of children, we have repeatedly noted our strong preference for permanent placement of children with relatives. As we said nearly two years ago:

> It has long been a familial phenomenon that the absence, inability or incapacity of the natural parents to provide and care for their children has prompted other relatives to step forward to assume the benefits and responsibilities of that role. While at one time, judicial intervention was unnecessary, a body of common law developed according a custodial preference to near relatives.

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4 The legislature has defined the term in two places: at Minn Stat. §257.025, regarding custody disputes, and Minn. Stat. §518.17, regarding marital dissolutions, but neither of those provisions is controlling.

In re M.M., 452 N.W.2d 236, 238 (Minn. 1990). Nothing in the present case has persuaded us that this common law principle favoring placement with family members should be abandoned now. Accordingly, we hold today that adoptive placement with a family member is presumptively in the best interests of a child, absent a showing of good cause to the contrary or detriment to the child.

This decision does no more than restate the policy of all three branches of state government. The legislative family preference expressed in Minn. Stat. §259.28, subd. 2 is also articulated in other statutory provisions. *See, e.g.*, Minn. Stat. §257.02 (permanent care and custody); Minn. Stat. §257.071, subds. 1 and 1(a) (foster placements); Minn. Stat. §260.011, subd. 2(a) (preference for in-home placement under the Indian Child Welfare Act); Minn. Stat. §260.191, subd. 1a(d) (children in need of protection); Minn. Stat. §256F.01 (permanency planning); and Minn. Stat. §260.181, subd. 3 (dispositions). In the most recent session of the legislature, it further indicated its strong belief in a family preference with the passage of 1992 Minn. Laws, chapter 557, which was signed by the governor on April 27, 1992, and took effect April 28, 1992. That bill amends several statutes, including the one at issue in this case, to apply a relative preference in *all* adoptions and foster care placements, regardless of the child's race. Act of April 17, 1992, ch. 557, 1992 Minn. Laws ____. Besides the governor's approval of 1992 Minn. Laws, chapter 557, the executive branch's preference for family placements is evident in Minn. R. 9560.0040, subp. 3, adopted by the Minnesota Department of Human Services, which directs placement agencies to make "special" efforts to recruit related individuals to become adoptive parents. Minn. R. 9560.0040, subp. 3.

This intergovernmental consensus reflects the common-sense notion that blood relatives are most likely

to look out for one another's interests, through good times and bad.

> Recognizing that those near of kin will be disposed to do more for its welfare and to advance its interests than those who lack the prompting of kinship, preference is given to near blood relatives, unless the situation disclosed indicates that it may be of advantage to the child to be placed in other hands.

Bienek, 155 Minn. at 315, 193 N.W. at 452-53[5]

Our holding does not mean that relatives' adoption petitions must be granted automatically. The terms "best interests," "good cause to the contrary" and "detriment" do not lend themselves to standardized definitions. The best interests of potential adoptees will vary from case to case, and the trial court retains broad discretion because of its opportunity to observe the parties and hear the witnesses. *See Jordet*, 248 Minn. at 442-43, 80 N.W.2d at 648. In exercising that discretion, a trial court must make detailed factual findings showing that the child's best interests are being served. But the nature of those findings is not subject to a precise formula because they will vary according to the fact situation.

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5 For purposes of applying this relative preference, we conclude that a child's legal relationship with his or her siblings, grandparents and other close relatives continues independent of the termination of the natural mother's and father's parental rights. *See In re M.M.*, 452 N.W.2d at 236 (grandmother treated as relative after parental rights of child's mother terminated). To hold otherwise would be to allow the application of the family preference to turn on the timing of the grandparents' petition to adopt, relative to the termination of parental rights. This seems to us arbitrary and inconsistent with the "best interests of the child" analysis.

In this case, the trial court did not employ the exact analysis we have set out today, but after a careful review of the record we find substantial support for the trial court's conclusions. The trial court made findings on the grandparents' health, their emotional and financial stability, the nurturing environment of their home, the presence in the home of D.L.'s two sisters, and the grandparents' willingness to supply the love and comfort D.L. will need in this transitional period of her life. In addition, there was no good cause shown why adoption by the grandparents would not be in D.L.'s best interests. The fact that separation from her foster parents will be initially painful to D.L. is not good cause to defeat the family preference. *See Wallin v. Wallin*, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971).

We share the trial court's belief that the benefits of a close relationship with blood relatives is in D.L.'s long-term best interests, justifying any temporary pain that this separation will bring. In reaching this conclusion, we recognize that the result might be understood to be at odds with *In re Niskanen*, 301 Minn. 53, 223 N.W.2d 754 (1974). In *Niskanen*, we upheld a trial court's rejection of a grandmother's adoption petition in favor of the petitions of her two grandchildren's foster parents. *Id.* at 54-56, 223 N.W.2d at 755-56. We believe that the result in *Niskanen* can be reconciled with our analysis today on the basis that on the particular facts of that case there was good cause not to apply a family preference. For example, the court there was influenced by the fact that the grandmother was over 60 years of age, was a widowed single parent and had experienced difficulty in parenting her own children. *See id.* These facts, relevant to "good cause," are not present in this case. But to the extent that *Niskanen* is inconsistent with today's holding, it is overruled.

Having held that the best interests of a child are presumptively served by adoptive placement with a

relative, we next turn to the proper procedure for applying this rule. In this case, the trial court chose to consider only the grandparents' petition in the initial proceeding. We hold that such a procedure is not required, but it is permissible, in the discretion of the trial court. When a presumption exists in favor of one petitioner over another, and there is no reason to believe that the favored petitioner will not prevail, judicial time and litigants' resources can be conserved by a single proceeding. If no petitioner has the benefit of a relative preference, or if more than one petitioner is related to the child, it might well be necessary to consider multiple petitioners in the same proceeding. But when it is not necessary, it is not encouraged. *See Wilson v. Barnett*, 275 Minn. 32, 35, 144. N.W.2d 700, 702 (1966). Furthermore, in this case appellants made no offer of proof at trial and on appeal have identified no relevant evidence which the trial court excluded. In light of the family preference, there is nothing in the record to suggest any prejudice to the appellants from the procedure adopted by the trial court.

The foster parents also have raised questions about certain evidentiary rulings and potential bias on the part of the trial judge. We find these claims to be without merit. The only significant evidentiary issue was a state senator's testimony about the legislative intent behind Minn. Stat. §259.28, subd. 2, which she authored. It is well established that a lone legislator is not competent to testify about the intent of a statute, even if she or he authored it. *See O'Laughlin v. Barton*, 582 N.E.2d 817, 821 (Ind. 1991); *Jackson v. Delk*, 361 S.E.2d 370, 372 (Ga. 1987); *Ruthven Consol. Sch. Dist. v. Emmetsburg Community Sch. Dist.*, 382 N.W.2d 136, 140 (Iowa 1986). *See also Delaney v. Superior Court of Los Angeles*, 789 P.2d 934, 943 n.12 (Cal. 1990). Under this rule, the senator's testimony was inadmissible, but the point is moot because we have not used the statute to decide this case. Similarly,

we reject the foster parents' argument that unexpected rebuttal testimony from an expert for the grandparents warrants a new trial. Surprise is not grounds for a new trial unless "there is a strong probability that a new trial would result differently." *Sward v. Nash*, 230 Minn. 100, 109, 40 N.W.2d 828, 833 (1950).

We also reject the foster parents' contention that they were denied a fair trial because of bias by the trial court. A judge may not preside in a case if he or she has an interest in its determination or if he or she could be excluded as a juror for bias. Minn. R. Civ. P. 63.02. "A judge may write, lecture, teach, and speak on non-legal subjects, * * * if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties." Canon 5, Code of Judicial Conduct. "The decision whether to grant a new trial [for judicial bias] * * * rests within the sound discretion of the trial court and will be reversed only for a clear abuse of that discretion." *Uselman v. Uselman*, 464 N.W.2d 130, 139 (Minn. 1990). We have closely reviewed the record and can find no evidence of bias in the trial court's handling of the case.

Finally, effective ten days after the date this opinion is filed, we lift the temporary restraining order that has prevented D.L. from being removed from her foster parents' home. This will allow the child to be moved to her grandparents' home so that all the parties can put this litigation behind them and get on with their lives. That certainly will be in D.L.'s best interests.

Affirmed.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT
JUVENILE DIVISION

DISTRICT COURT NO. AD-170884

IN RE THE ADOPTION OF:
DANIESHA LOFGREN

STEPHEN SHARP and JANET SHARP,
PETITIONERS,

vs.

HENNEPIN COUNTY, BUREAU OF
SOCIAL SERVICES,
RESPONDENTS,

vs.

HILTON WALKER and INELL WALKER,
INTERVENORS.

TRIAL TRANSCRIPT
VOLUME 7

DIRECT EXAMINATION OF
STEVEN SHARP

Q Who were the relatives that they found?

A They found the grandmother.

Q What did they tell you specifically the plan for the grandmother was?

A Specifically the plan was that in a couple of weeks – and they weren't real definite on that – but in a couple of weeks the grandmother would be coming to the Twin Cities and would visit Daniesha for a period of about three days. And then following that, when she returned home, she would take Daniesha with her.

Q At any point did you bring up the subject of you wanting to adopt Daniesha?

A Yes, I did.

Q What did you say?

A I remember that I specifically asked Ms. Shefeld (sic) if she had retrieved the home study that we had done. The response was from Ms. Malfeld, and her response was that they were planning to go ahead with the program that they had in mind but, in the absence of family, they would still have chosen a same race family and that we were, therefore, not appropriate candidates.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT
JUVENILE DIVISION

DISTRICT COURT NO. AD-170884

IN RE THE ADOPTION OF:
DANIESHA LOFGREN

STEPHEN SHARP and JANET SHARP,
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HENNEPIN COUNTY, BUREAU OF
SOCIAL SERVICES,
RESPONDENTS,

vs.

HILTON WALKER and INELL WALKER,
INTERVENORS.

TRIAL TRANSCRIPT
VOLUME I

CROSS EXAMINATION OF
INELL WALKER

Q Up until that time, had she asked you anything about your health?

A I don't recall.

Q Up to that time, had she asked you whether or not you had ever had any problems with abusing of children or any convictions about harming children?

A Not in that words. But she did say there would have to be some – Well, in some words she did. She said that the baby could be placed with me because they would have to do some record checking, maybe as a foster parent, child, in my home, until they could check the records and find, you know. She said there would have to be a home study. She went over some of the – I can't recall how she said it, but I do know she did say that the baby wouldn't just be brought from here and placed in my home. It would be placed in my home according to the way it was in the Sharps' home. A home study would have to be done. There would have to be a lot of paperwork did before I could bring the baby.

Q But she said you were going to get the baby?

A I don't recall.

Q Didn't you testify earlier that she said that you would be here three days and on the fourth day you could take the baby?

A Yeah, I could take the baby. She said according to foster parents, do not have any, you know, coverage over a child until four days. You fly in here and you visit with the baby three days and you can fly with her on the fourth day.

Q Did she tell you before you came to Minnesota that there was a couple named the Sharps that wanted to adopt that baby?

A No.

Q She didn't mention a word of that to you?

A No.

Q Did she ever ask you if you had been involved in any abuse and neglect in the past?

A I can't recall.

Q Did she ask you if you had any children with a criminal record?

A I can't recall.

Q Did she even ask you how many children were in your home?

A I can't recall.

Q I'm going to once more go to your deposition. Now I'm going to go to page 8. I want to ask you if you recall these questions and answers. And this refers to the first question which is on page 7. "Did Jean Webb ever tell you or Penny Scheffler or Carol Ann White, that it's important for an African-American child to be raised in an African-American home?" "No." "Did they ever ask you how old you were?" "No." "Did they ever ask you of your physical health?" "No." "Did they ever ask you if you had been involved in abuse or neglect in the past?" "No." "Did they ever

ask you if you had a criminal record?" "No." "Did they ask you if you had any children with a criminal record?" "No." "Did they ever ask you how many children were in your home?" "No." Do those questions and answers help refresh your memory as to whether or not you were asked those questions before being told that you would have Daniesha?

A Ask me that again.

Q Do you recall those questions and answers being asked?

A Okay. Yes. What is it you asked?

Q Do these truly set forth your answers on November 15 of 1990?

A You said before – You asked me – Do it again, please.

Q After reading these questions, let me ask you, do you recall those questions and answers at the deposition?

A I think I recall. I don't know.

Q And my question now is: They didn't ask you any of those things before they told you you were going to have Daniesha, did they?

A I never saw them papers. I didn't know.

STATE OF MINNESOTA
COUNCIL ON BLACK MINNESOTANS

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THE AFRICAN AMERICAN CHILDREN
AND FAMILY SURVIVAL COMMITTEE

WITHIN THIRTY (30) DAYS A SYSTEM MUST BE DEVELOPED TO EFFECTIVELY MONITOR THE "MINORITY HERITAGE CHILD PROTECTION ACT." THIS COMMITTEE WILL EVALUATE THAT SYSTEM AND ALL RECOMMENDATIONS FROM THIS COMMITTEE MUST BE FOLLOWED, *PRIOR* TO IMPLEMENTATION OF THE NEW SYSTEM.

DEMANDS:

1. All African American children who are presently placed with white foster families must be moved immediately and placed with African American foster families.

   60 days

2. All African American children in the future must be placed with African American foster / adoptive families.

3. Siblings will not be separated when removed from their families.

4. Siblings who are separated in foster homes must be reunited into one African American home.

5. Relatives must be explored as the first placement resource. This includes relatives in the State of Minnesota, as well as those that live in other states / countries.

6. Relatives must be used *before* utilizing the foster care system.

7. The County's policy of basing placement of children into foster homes where one parent has to be in the home *must be changed* so that the policy reflects the needs of the child as the basis of placement, *not* the circumstances of the foster family.

8. All activity regarding *any* "orphanages" *MUST BE STOPPED IMMEDIATELY. Any further discussion MUST include members of this Committee.*

STRATEGIES:

1. The counties must hire African American staff in proportion to the number of African American children served. *Staff includes, not only Child Protection Workers, but Supervisors, Program Managers and Division Managers as well.*

   Further, the counties must hire 10 African American Advocates IMMEDIATELY.

2. Child Protection Workers must be screened as closely as potential foster care parents are BEFORE being placed on their jobs.

3. Counties must provide training immediately to judges and social workers in the entire system that work with

communities of color. Those training programs should be developed with communities of color, i.e., Council on Black Minnesotans.

60 days

4. Arrangements for *therapy* will be with African American professionals.

5. To facilitate the *move* to African American families, White foster parents will receive therapy so as not to sabotage the move.

6. African American children, who are being *reunited* with their siblings *must* receive therapy [around reunification and grief, and how to function again as a family] with *African American therapists*.

7. *All* RTC's will be reviewed by this Committee which will determine which RTCs are inappropriate resources. Those inappropriate RTCs will no longer be used for African American children from Hennepin County.

8. There needs to be a *Unit* created for the purpose of doing "relative searches."

For further information call the Council on Black Minnesotans - 612/642-0811.

STATE OF MINNESOTA
COUNCIL ON BLACK MINNESOTANS

Wright Building, Suite 426
2233 University Avenue
St. Paul, MN 55114
(612) 642-0811

OUT-OF-HOME PLACEMENT
TASK FORCE

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Division Manager
Child Protection Division
Health Services-Level II
Minneapolis, MN 55487

Ms. Elvira Barnes-Wycough *
Public Policy Research Analyst
Council on Black Minnesotans

Mr. Ronald Bell
Supervisor, African American
Advocates and Relative Search
Unit, Hennepin County

Reverend Ian D. Bethel *
Council on Black Minnesotans
Board of Directors
State and National One
Church / One Child, Pastor of
New Beginnings Tabernacle

Ms. Peggy Brown *
Hennepin County
Developmental Disabilities

Reverend Richard H. Coleman *
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Pastor, St. Peter's A.M.E.
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Mr. Lester R. Collins *
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Division Manager, Community
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Ms. Ella Gross
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ARC Hennepin County

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One Church / One Child
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Rep. Richard Jefferson *
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Council on Black Minnesotans
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577 State Office Building
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Mr. Michael Jones *
Intern, House of
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c/o Rep. Richard Jefferson

Ms. Lynn Jones *
Minneapolis African American
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Mr. Louis Kaluza
Hennepin County Child
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Foster Parent
Guardian Ad Litem

Ms. Lorraine Smaller *
Director
Minneapolis Afrocentric After School Program

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Family Advocate
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Ms. Carol Ann White *
Social Worker
Hennepin County

Janet Wiig
Director
Children's Services Division
Department of Human Services

*** Indicates member of the African American Children and Family Survival Committee**

LETTER FROM

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Regional Manager
Office for Civil Rights

Region V
105 West Adams
Chicago, Ill 60603

Telephone TTY:
312/353-5693

March 3, 1992

Debra and Robert Mick
1909 W. 90th Street
Bloomington, MN 55431

Docket Number: 05913251

Dear Mr. and Mrs. Mick:

The Office for Civil Rights (OCR) has completed its investigation of your complaint filed on September 25, 1991 against the Hennepin County Department of Community Services, hereinafter referred to as the recipient. The complaint alleged that the program discriminated against a biracial child on the basis of race by planning to remove her from her white foster parents solely on the basis of race. OCR has concluded that the recipient violated certain provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and its implementing regulations, 45 CFR Part 80, as described below.

OCR is responsible for investigating complaints of discrimination on the basis of handicap against recipients of Federal financial assistance from the Department of Health and Human Services. As a recipient of Title IV-B and Title IV-E of the Social Security Act and Social Services Block Grant funds, the recipient is subject to the provisions of Title VI which prohibit such discrimination.

The specific issue and finding in this complaint are listed below.

ISSUE:

Whether the recipient engaged in racially discriminatory practices in the course of attempting to remove a biracial child from white foster parents in violation of 45 CFR 80.3(a), (b)(1)(i), (ii), (iii), (iv), (v), and (vi) and (2)

FACTS:

The biracial child in question was born on January 24, 1989 to a white mother. Paternity of the father has not yet been established or agreed to, but the biological father is believed to be black. The child was placed directly from the hospital into her current placement with a white foster family on January 26, 1989. At the time, the child has four half-siblings also believed to be biracial who were placed in other foster homes or with their relatives, and with whom the child had no contact until July 1991.

In 1990 the recipient established a Placement Review Committee to review all transracial foster care placements in the county. In November 1990 the committee reviewed the child's placement and recommended not to pursue termination of parental rights, but to locate relatives for

the child and her half-siblings and to place them together. The recommendation to move the children in with relatives was given new impetus in mid-1991 when efforts to reunify the five children with their biological mother failed. In July 1991 the recipient decided to move all the male children to the home of a black great uncle of three of the child's half-siblings, and the female children to the home of a black great aunt of three of the child's half-siblings. The child in question bears no blood relationship to either the great uncle or the great aunt.

The Minnesota Minority Heritage Preservation Act (the Act) establishes an order of preference regarding the out-of-home placement of children. The Act gives first preference to a relative placement, where one exists, except where the relative placement would be detrimental to the child. The Act also requires that deference be given to the biological parents' placement preference, consistent with the child's best interest. The evidence collected by OCR establishes that the recipients actions with respect to the child in question were not consistent with the requirements of the Act, and were in fact based solely on race.

First, the recipient contends that placing the child with relatives was the motivating factor for the child's proposed removal from her white foster home. The Act defines a relative to include members of the child's extended family and important friends with whom the child has resided or had significant contact. The recipient's Foster Care Rule 9545 defines a relative, for foster care purposes, as a person related to the child by marriage, blood, or adoption as follows: grandparent, brother, sister, stepsister, stepbrother, niece, nephew, uncle, aunt, legally appointed guardian, great grandparent, great aunt and great uncle. The great aunt with whom the recipient proposes to place

the child does not meet either of the above definitions, nor does the great uncle.

While the recipient contends that placing the child together with her half-siblings is of primary importance, the recipient did not arrange for the child to meet her half-siblings during the first two and a half years of the child's life. The child's plans and reports never indicated that she should either meet or visit her half siblings. Further, reviews of other cases revealed that the majority of sibling groups are separated into different foster homes. Of the 22 foster care cases reviewed involving sibling groups, 14 (64%) were separated with no indication of reunification and only eight (36%) were not separated. Thus, placement of siblings together in foster care has not been standard practice in foster care placement decisions.

Second, there is substantial evidence that removing the child from her current placement would be detrimental to the child. The child was assessed by a developmental pediatrician whose opinion states that removing the child to another placement would be emotionally harmful and probably would have short-term and long-term negative emotional consequences. The opinion further states that a change of parenting at this time would be risky to the child's future emotional development. The child's guardian ad litem is also of the opinion that removing the child would not be in the child's best interest given the child's age and the length of time the child has been in her current placement. There is no evidence that the recipient evaluated the child to determine the possible consequences of removing her from her current placement.

Last, the child's biological mother wrote and signed an affidavit clearly stating her preference that the child not

be moved from the child's current placement and further stating her preference that the child be adopted by the child's white foster parents. The affidavit further stated that the fact that the child is biracial and the foster parents are white should not matter since the biological mother is herself white. There is no evidence to support the conclusion that deferring to the biological mother's placement preference in this case would not be in keeping with the child's best interest. The recipient has conceded that the child's white foster family has provided the child with excellent care.

There is additional evidence to support a conclusion that the recipient's actions with respect to the child were based solely on race. In early 1991 the recipient maintained a relative search committee, the purpose of which was to locate relatives for minority children in transracial placements. Despite the recipient's claim that it was attempting to place the child with relatives, there is no indication that the relative search committee considered or attempted to contact the biological mother's relatives, who are white. While the social worker has stated that the birth mother indicated a lack of interest on the part of her relatives, this was never documented in the child's file and cannot be substantiated or refuted by the birth mother since her whereabouts are currently unknown. The birth mother's mother has stated that the recipient never contacted her to ask of her interest in her grandchildren.

A progress report describing the recipient's placement activities with respect to the child states that the child was to be moved in order to make a same-race placement, and that adoption by the white foster parents would not be allowed because the child was biracial. The fact that the progress report was never submitted for use in court proceedings does not alter the fact that it reflects the

recipient's perspective in making placement recommendations. Further, social workers' notes from December 1990 stated that in keeping with the recommendation of the Placement Review Committee, the child and three of her half-siblings would be removed from transracial to same-race placements if relatives could not be found. The children were not moved because a court order was entered barring the move.

Title VI and its implementing regulation permits recipients on a case by case basis to consider race or ethnicity as one of several factors in making foster home and adoption placement decisions, but only when it can be demonstrated that such is in the best interests of a particular child. A number of the recipient's actions with respect to the child in question violated Title VI. Nearly two years after the child was placed with a white foster family, the recipient began pursuing a same-race placement for the child. In doing so, the recipient disregarded the biological mother's placement preference. The recipient further disregarded the foster parents' interest in adopting the child. There is no evidence that the recipient evaluated the child to determine the possible consequences of removing her from her current placement. In its search for relatives, the recipient made no attempt to contact the birth mother's relatives, and finally recommended placement with an individual who has no blood relationship to, and has had no significant contact with, the child. Finally, social workers made written and verbal comments indicating a recommendation to move the child was being made on the basis of race.

FINDING

The preponderance of the evidence demonstrates that the recipient engaged in racially discriminatory practices in the course of attempting to remove a biracial child from white foster parents in violation of 45 CFR 80.3(a), (b)(1)(i), (ii), (iii), (iv), (v), and (vi) and (2).

CORRECTIVE ACTION

The corrective actions which the recipient must take include, but may not be limited to, the following:

1. If the recipient intends to recommend removal of the child, such a recommendation must be based on a comprehensive assessment of *all* of the child's best interest criteria. The recipient will not take any further action or make any recommendations based on the race, color, or ethnicity of the child or her foster parents unless it is documented that such action or recommendation is in keeping with the child's best interests. Refrain from taking or recommending further action with respect to the child's removal unless the recipient can document that the actions it proposes are in keeping with the child's best interests.

2. Amend existing policies and procedures to assure that: (1) transracial placements are not prohibited or discouraged; (2) race, color, or national origin is not the primary consideration in placement decisions; and (3) children are not restricted in terms of the racial or ethnic characteristics of families considered for placement, unless there exists documentation developed on a case-by-case basis that establishes a

given child's need to be placed with a family of a particular race, color, or national origin.

The amended policies and procedures will include the following provisions:

a. The placement decision for every child, including biracial or multiracial children, shall meet the child's best interests and address the special needs of the child. Whether or not the foster or adoptive family is knowledgeable and appreciative of the child's racial or ethnic heritage may be one consideration. However, the determining criterion in the selection or rejection of a placement shall not be race, color, or national origin, unless an individual assessment of the child documents factors which support a determination that the best interests of the child require placement with a family of the same race, color, or national origin;

b. Child-specific recruitment activities may be conducted to locate a placement that is in the particular child's best interests, provided that such recruitment activities are not motivated primarily by a desire to match the child's race, color, or national origin with that of the child's foster / adoptive family. Recruitment activities that are motivated primarily by a desire to match the child's race, color, or national origin with that of the child's foster / adoptive family may be conducted only when an individual assessment of the child documents factors which support a determination that the best interests of the child require placement with a

family of the same race, color, or national origin;

c. Placement decisions shall not be delayed for the purpose of trying to locate a family of the child's race, color, or national origin unless an individual assessment of the child documents factors which support a determination that the best interests of the child require placement with a family of the same race, color, or national origin;

d. In keeping with the best interests and special needs of each child, consideration shall be given to families that are not of the same race, color, or national origin of the child. Such consideration shall include, but shall not be limited to, current and prior caregivers;

e. When transracial placement is the plan for a child, special services shall be provided to assure that the child and the family understand, value, and respect the child's culture and heritage;

3. Disseminate copies of the amended policies and procedures developed pursuant to Item 2 above to all staff involved in child placement activities.

4. Disseminate copies of the amended policies and procedures developed pursuant to Item 2 above to all agencies involved in child placement activities, community organizations, and other interested persons who are involved in child placement activities.

5. Provide in-service training to all staff involved in child placement activities on proper application of the amended policies and procedures. Such training will be conducted on a semi-annual basis. As part of such training, staff will be instructed that they may not follow or advocate any previous policy, procedure, or practice which uses race, color, or national origin as the determining factor in a placement decision, e.g., searching for a specified period of time for a same-race placement before considering transracial placement, automatically selecting a same-race placement without considering transracial placements, etc. The recipient may wish to videotape the training sessions for future use.

6. Disseminate notice of the new licensing rules, policies, and procedures to all organizations which provide adoption listings or publicity services, and assure that all information published about children in the recipient's custody is free of references to desired racial or ethnic characteristics of prospective foster / adoptive families. References to desired racial or ethnic characteristics of prospective foster / adoptive families will be permitted only if an individual assessment of the child documents factors which support a determination that the best interests of the child require a family of the same race, color, or national origin;

7. Collect and provide to OCR the following data on a quarterly basis for every child of whom the recipient has or acquires custody, or for whom the recipient makes a placement recommendation. The data shall be collected for a period of one year:

   a. name or ID#;

b. race, color, and national origin of the child;
c. date of birth;
d. unusual circumstances / requests from parents or child with regard to placement;
e. date of permanent custody;
f. date of initial foster care placement;
g. dates of all foster care replacements, and the reason for such replacements;
h. dates of placement for adoption;
i. race, color, and national origin, and city and state of residence of all families who inquire about adopting the child;
j. race, color, and national origin, and city and state of residence of the adoptive family selected, as well as a brief description of why that family was selected as compared to all others;
k. whether placement with a family of the same race, color, or national origin is considered necessary and, if so, a copy of the individual assessment that details the factors establishing such need;
l. factors preventing adoption of each child who has been free of adoption for a period of 60 days or more;
m. whether a family of a race, color, or national origin different from the child's has applied to adopt the child and is awaiting approval or has been denied approval, together with the reasons for such delay or denial.

Our procedures provide recipients a sixty (60) day period during which a recipient may correct the violation(s) or submit an acceptable corrective action plan. We are available to provide technical assistance in developing a corrective action plan, if needed, however, we request that

you contact our office as soon as possible but no later than ten (10) days from the date of this letter if you wish to discuss the terms of such a plan or need other assistance. If we do not hear from you within 10 days, a representative of this office will contact you.

Please be advised that this sixty-day period is solely for the purpose of securing voluntary compliance. Any information you submit with the intention of rebutting OCR's finding will be discussed or considered during the enforcement proceedings.

If the sixty day negotiation period does not result in a successful resolution of this investigation, we will recommend the initiation of enforcement action either by administrative or legal proceedings in accordance with 45 CFR 80.8, 80.9 and 80.10.

This determination is not intended and should not be construed to cover any other issues which may exit and are not specifically discussed herein regarding compliance with Title VI of the Civil Rights Act of 1964.

Under the Freedom of Information Act, 5 U.S.C. 552, and its pertinent regulation, 45 CFR Part 5, it may be necessary to release this document and related correspondence and records upon request. In the event OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, would constitute an unwarranted invasion of privacy.

If you have any questions, please contact me at (312) 886-2359 or Alfred Sanchez, Division Director, at (312) 353-5731.

Sincerely yours,

Alfred Sanchez for
Charlotte Irons
Regional Manager
Office for Civil Rights
Region V



STATE OF MINNESOTA DISTRICT COURT
IN COURT OF APPEALS

C7-91-1173

IN THE MATTER OF THE
WELFARE OF: D.L.

APPELLANTS' BRIEF

(starting on page 41)

III.

THERE WERE IRREGULARITIES IN THE PROCEEDINGS WHICH DEPRIVED APPELLANTS OF A FAIR TRIAL.

(1) The trial court was prejudiced. "Bias or prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion the merits of same basis other than what the judge learned from his participation in the case." *Nachtsheim v. Wartnick* 411 N.W.2d 882, 890 (Minn. Ct. App. 1987).

The trial court's language indicates a bias against interracial adoptions: "The 80% non-Afro-American placement rate to which Minnesota's Afro-American children were until recently *subjected*, is all too close to the 90% non-Indian placement rate that led to the passage of the Indian Child Welfare Act of 1978". (Trial court mem., at p. 7, A-56). [Emphasis supplied] Viewing African-American children as being "subjected" to interracial adoption smacks of racism.[1]

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1 Senator Berglin's inadmissible testimony is the source of the 80% placement figure. (*See* tr. vol. 2 at pp. 33-36 and Writ of Prohibition, April 4, 1991, at p. 2, A-19).

The trial court's bias against interracial adoptions may stem from its opinion held *prior* to trial that the vast majority of white Minnesotans are "radical ethnocentrics":[2] "It is clear to *me* that the *vast majority* of white Minnesotans unthinkingly accept white culture as the norm – indeed, as the whole of reality. *To such radical ethnocentrics*, people of color are forever too weak . . . or to scary . . ."[3] (Article, June 21, 1990, A-99) [Emphasis supplied] Those white who try not to be racists, the court believes, spend their time trying to "transform [people of color] into a reasonable facsimile of white people." (*Id.*)

The trial court's views disadvantaged Appellants. They are white and want to adopt an African-American baby. Thus, in the trial court's eyes they are likely to either be radical ethnocentrics or attempt to transform D.L. into a reasonable facsimile of a white child.

These views entered the decisionmaking process: "It has long been recognized, and is undisputed here, that it is highly desirable for children to be raised by adults who are like them racially." (Trial court mem. at p. 6, A-55).[4]

In fact, at the *initial* hearing the trial court stated that Appellants had "an uphill fight, that's for sure". (Excerpt of transcript, Oct. 11, 1991 at p. 17) While the trial court

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2 The terms racism and ethnocentric are defined similarly: viewing one's race as superior. (*See e.g.*, *Merriam-Webster Dictionary*, 1974) The trial court's explanation of what she meant is contained in the Memorandum attached to the Order denying Appellants' motion for a new trial. (A-102)

3 Counsel received a copy of this article by mail only after trial.

4 Appellants cannot find any evidence to support this statement in the transcript. To the contrary, the evidence regarding identity issues showed no statistically significant difference between black children raised in black adoptive homes and black children raised in white adoptive homes. (Tr. vol. 5 at p. 74) (*See also*, Bartholet, *supra*. at pp. 1207-1216)

said it was not an "uphill fight that can't be won" (*Id.*) and was talking about the "law", at least in the context of the statement, nonetheless this opinion was expressed without knowing anything about the Grandparents or Appellants.

The trial court even stated that black community pressure was making the county work "better". (*Id* at p. 22)[5]

(2) The trial court's conduct deprived Appellants of a fair trial.

(a) On November 20, 1990, the trial court assured Appellants that their petition to adopt would be heard. (Excerpt of proceedings, November 20, 1990, at p. 32, A-112) Thursday afternoon (4 days before trial) Counsel was informed by telephone that Appellants' petition would not be heard.[6] The theory of the case, scheduling of witnesses, the order of proof, etc., which had taken months to prepare had to be changed over the weekend. The type of proof at trial necessarily changed. That Appellants' home was the best available home for D.L. was no longer relevant given the issue framed by the trial court. Evidence therefore was focused on the County's bias, the Grandparents, and the harm to D.L.

(b) The Court erred in refusing to allow inspection of the records of the Grandparents and their family in the State of Virginia. (Tr. vol. 3, at pp. 42-54)

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5 Ms. Malfeld at her deposition testified that Hennepin County "pursued vigorously" enforcement of the Heritage Act beginning in 1988. (Deposition Malfeld, at pp. 79-80, A-148-149) Since 1988, no African-American children were placed in Caucasian adoptive homes, according to the County's Answer to Interrogatories. (Answers to Interrogatory No. 1 and copy of answering, A-139-141).

6 Appellants received the Order limiting the issue to whether there was good cause not to permit the Grandparents to adopt D.L. the next day (Order, January 11, 1991, A-12; Affidavit of Counsel, A-96-98).

The information was important to determine the truthfulness of the Grandparents' testimony that their eldest son did not live in the home. (*See supra.*, at sec. III(C)(1)).

(c) The trial court's rulings improperly protected Hennepin County's conduct and system which promotes racial discrimination. On two occasions, the trial court interrupted cross-examination curtailing legitimate cross-examination intended to prove bias – a totally proper area of questioning. (*See* 20B, Dunnell's Minn.Dig., *Witnesses*, Section 7.03(a) and cases cited) In each instance, the trial court engaged in colloquies justifying Hennepin County's use of African-American and Native American advocates to the exclusion of all other races stopping a showing of County endorsed racial discrimination that was unfolding in cross examination. (*See* tr. vol. 4, at pp. 56-58 and 80-84)

Perhaps the most outstanding protection of a witness during cross examination occurred at pages 66-69, transcript volume 4, where the trial court admitted trying to get Counsel "a little scared" and shut off inquiry into important questioning. The dispute between Counsel and the trial court arose out of the trial court's misconstruing a witness' answer. (Tr. vol. 4 at p. 69) The trial court imposed its understanding of the answer on Counsel and shut off further inquiry on a key evidentiary point going to the issue of racial favoritism.

(d) The trial court abused its discretion in allowing the County to call a surprise witness and to allow him to give opinions based in part on a non-disclosed book.

A trial court's refusal to grant a new trial on the basis of surprise where the party objects, and seeks a continuance, may be reversed for abuse of discretion. *Nachtsheim v. Wartnick*, 411 N.W.2d 882 (Minn. Ct. App. 1987).

The County moved at the end of trial one day to present Dr. Kutner the next day as a rebuttal witness. (Tr. vol. 6 at pp. 88-99) Appellant objected because he had not been disclosed, was not discussed in the Answer to Expert Interrogatory, and was called properly a case-in-chief witness. (*Id.*)

Additionally, the County Attorney had represented the previous day that there probably would not be any writings offered during testimony, but if there were they would be timely produced. (*Id.* at p. 98) The next day, without any advanced warning, and even though the testimony of Dr. Kutner did not begin until after the noon break, the County Attorney inquired about recent literature and specifically asked about a particular title and author. (*Id.* at p. 69) The County Attorney had given no warning to Appellants' Counsel contrary to his promise to make literature available if he was going to use it. The text was not even in the bookstores yet. (Tr. vol. 7 at p. 69)

On *voir dire*, Dr. Kutner admitted that part of his opinion would be based on that book, *The Psychology of Adoption*. (*Id.* at p. 73) Based on Answers to Interrogatories and this surprise book, the failure to mention the book in the Answers to Interrogatories, and the surprise introduction of it, objection was taken to his opinions and testimony. (*Id.* at pp. 73-74, and 75-76) The objections were overruled. (*Id.* at p. 74)

Finally, Appellant requested time to read the book before cross examination, and the trial court denied even this request. (*Id.* at p. 76). Refusing the request for continuance to adequately prepare for cross-examination, in light of the misrepresentation and surprise is an abuse

of discretion requiring the expungement of Dr. Kutner's testimony *in toto*, and a reversal of judgment because it is based in part on his testimony.

Shane C. Perry
Shawn M. Perry
Stewart R. Perry
Perry, Perry & Perry
110 Norwest Bank Building
900 East Wayzata Boulevard
Wayzata, MN 55391
(For Appellants)

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT
JUVENILE DIVISION

167768-97

IN THE MATTER OF THE
WELFARE OF DANIESHA LOFGREN

HEARING

The above-entitled matter came on for hearing before the Honorable Isabel Gomez, one of the Judges of the above-named Court, on the 20th day of November, 1990, at the Juvenile Justice Center, City of Minneapolis, County of Hennepin and State of Minnesota.

Stewart Perry, Esq., and Shane Perry, Esq., appeared on behalf of the Petitioners, Steven and Janet Sharp.

Steven Belton, Esq., and Robert Barrows, Esq., appeared on behalf of Hilton and Inell Walker.

William Nieman, Esq., Assistant Hennepin County Attorney, appeared on behalf of Respondent, Bureau of Social Services.

George Stephenson, Esq., appeared on behalf of the Guardian ad Litem, Jane Moore.

Clerk: David Fingerman.

Reporter: Darlene Heinz.

* * *

MR. SHANE PERRY: It was not the Petitioners who raised race as the issue, Your Honor. I have a letter that I would like to have marked and have entered as an exhibit at this hearing, from Mr. Neiman, dated November 1, to the NAACP that states, "These cases involve among other matters at first impression constitutional challenge to the cultural preferences in Minnesota's adoption laws. This issue is highly complex and enormously significant and my office needs assistance from those organizations / individuals with the necessary expertise to comprehensively address the legal and public policy issues." I have only read a part of this letter, Your Honor.

* * *

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No. 92-616

In the
Supreme Court of the United States
October Term, 1992

IN THE MATTER OF THE WELFARE OF D.L.

Stephen Sharp and Janet Sharp,
Petitioners,

vs.

Hennepin County Bureau of Social Services,
Respondent,

vs.

Hilton Walker and Inell Walker,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

RESPONDENT GUARDIAN AD LITEM'S BRIEF IN SUPPORT OF PETITION

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QUESTIONS PRESENTED

1. Whether the minor child, D.L., was denied due process and equal protection under the Fourteenth Amendment of the United States Constitution when the Minnesota courts applied relative preferences and the preferential scheme provided in Minn. Stat. § 259.28, subd. 2, which in its original version and its revised version focuses on race and ethnic heritage when considering adoption petitions.
2. Whether Minn. Stat. § 259.28, both in its original and revised version, is unconstitutionally vague in its definition and application of the terms "race" and "ethnic heritage" in adoption proceedings, and therefore violative of the due process provisions of the Fourteenth Amendment of the United States Constitution.
3. Whether the continued application of a relative preference by the Courts and governmental entities in the State of Minnesota, whether based on state statutes or common law, is violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Respondent Guardian ad Litem concurs with the Petitioner's List of All Parties.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

RESPONDENT GUARDIAN AD LITEM'S BRIEF IN SUPPORT OF PETITION

Respondent Guardian ad Litem, Jane Esbensen Moore, joins Petitioners Stephen and Janet Sharp in respectfully requesting that this Court grant the Sharps' petition for review of the Minnesota Supreme Court's opinion in this case, *In the Matter of the Welfare of D.L.*, 486 N.W.2d 375 (Minn. 1992).

CITATIONS TO THE OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 486 N.W.2d 375 (Minn. 1992) and the opinion of the Minnesota Court of Appeals is reported at 479 N.W.2d 408 (Minn. Ct. App. 1991). The full text of both opinions is contained in the Petitioners' appendix.

JURISDICTION

On June 12, 1992, the Minnesota Supreme Court filed its decision affirming the Minnesota Court of Appeals decision cited at 479 N.W.2d 408 (Minn. Ct. App. 1991). Petitioners Sharps filed their Petition for a Writ of Certiorari in a timely fashion on September 9, 1992, and with an assertion of jurisdiction pursuant to 28 U.S.C. § 1257(a). Respondent Guardian ad Litem now submits its supporting response pursuant to Supreme Court Rule 12.4 (1991 rev. ed.) and instructions from the office of the Clerk of the United States Supreme Court within twenty days of receipt of notice of admission of the Petitioners' attorneys to the United States Supreme Court Bar.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent Guardian ad Litem concurs with the Petitioners' statement of constitutional and statutory provisions, except that she believes it is critical that this Court also have before it the revised Minn. Stat. § 259.29, subd. 2. This statute was amended by the Minnesota legislature after the Minnesota Court of Appeals declared the statute unconstitutional and before the matter was heard by the Minnesota Supreme Court:

Minn. Stat. § 259.28, subd. 2 (1992):

Subd. 2 Protection of heritage or background. The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring

due consideration of the child's race or ethnic heritage in adoption placements. For purposes of intercountry adoptions, due consideration is deemed to have occurred if the appropriate authority in the child's country of birth has approved the placement of the child.

In reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or if that is not feasible, to (c) a family of different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child's racial or ethnic heritage.

If the child's genetic parent or parents explicitly request that the preference described in clause (a) or in clauses (a) and (b) not be followed, the court shall honor that request consistent with the best interests of the child.

If the child's genetic parent or parents express a preference for placing the child in an adoptive home of the same or a similar religious background to that of the genetic parent or parents, in following the preferences in clause (a) or (b), the court shall place the child with a family that also meets the genetic parent's religious preference. Only if no family is available as described in clause (a) or (b) may the court give preference to a family described in clause (c) that meets the parent's religious preference.

STATEMENT OF THE CASE

The Guardian ad Litem concurs with the Sharps' Statement of Facts, Adoption Proceedings and Appellate History as contained in their Petition for the Writ of Certiorari. The Guardian ad Litem would, however, like to provide the Court with some additional detail regarding her role as a party in these proceedings.

The Guardian's role in this matter from the beginning has been to look out for the child's best interests after the child first became involved in Juvenile Court, after Hennepin County moved to terminate the parental rights of the child's biological mother and after Hennepin County introduced the child's maternal grandparents as possible permanent custodians in opposition to the petitioner foster parents. Both the petitioner foster parents and the grandparents indicated and pursued desires to adopt the child, thus precipitating the litigation here at issue. The Guardian visited the foster home and observed the interaction of the child and foster parents. She also visited the grandparents in Virginia, and observed visitations between the grandparents and the child.

At the trial on the adoption petitions, the Guardian was called upon to make a recommendation as to which petition would be in the child's best interests. At that time, she stated that she was unable to make a recommendation either way, primarily because the trial judge at the start of trial had determined that the Petitioners' adoption petition would be excluded from consideration at that time and only the grandparents' adoption petition would be dealt with. The Guardian believed that a consideration of the best interests of the child required that both petitions be considered and all relevant evidence regarding both petitions be presented.

In the appeals to the Minnesota Court of Appeals and the Minnesota Supreme Court, the Guardian noted her opposition to Minn. Stat. § 259.28, subd. 2, with its preferences for same race and ethnic background; its preference for relatives; and its unequal treatment of children depending on the manner in which they enter the Juvenile Court and adoption system. In the Guardian's opinion, as more fully stated in the appellate

briefs, the Minnesota courts should have considered the child's best interests without any of the preferences – whether these be preferences based on family, race or ethnic heritage. For that reason, she supports the Petitioners' request for the Writ of Certioari so that this Court will review the decision of the Minnesota Supreme Court in this matter.

REASONS FOR GRANTING THE WRIT

I. *MINN. STAT. § 259.28, SUBD. 2, AND RELATED COMMON LAW DOCTRINE INVOLVING PREFERENCES IN ADOPTIONS AS APPLIED BY THE MINNESOTA SUPREME COURT ARE REPUGNANT AND CONTRARY TO THE UNITED STATES CONSTITUTION ON SEVERAL GROUNDS AND SUCH USE OF PREFERENCES IN ADOPTION PROCEEDINGS SHOULD BE REVIEWED BY THE UNITED STATES SUPREME COURT.*

The Minnesota statute at issue in this matter raises the question of the state's role in regulating foster parent adoptions, trans-racial adoptions and trans-cultural adoptions. The statutory scheme in Minnesota, along with the interpretations by Minnesota common law and slight modifications by the Minnesota legislature, are all in violation of such fundamental constitutional principles as the right to equal protection, due process of the law, and the right to the people to have statutes that are not so vague that their meaning cannot be understood and applied in a reasonable fashion. Disputes raising such important constitutional issues are matters appropriately reviewed by this Court.[1]

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[1] As an indication of the importance of the topic of racial and ethnic preferences in adoption, *see e.g.*, Bartholet, *Where do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. of Penn. L. Rev. 1163 (1991); Perry, *Race and Child Placement: the Best Interest Test and the Cost of Discretion*, 29 J. of Fam. L. 51 (1990); Bowen, *Cultural Convergences and Divergences: The Nexus between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. Fam. L. 487 (1987-88); Grossman, *A Child of a Different Color: Race as Factor in Adoption and Custody Proceedings*, 17 Buffalo L. Rev. 303 (1968); Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 Notre Dame L. Rev. 503 (1984); O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 Tulsa L.J. 485 (1986); Note, *Constitutional Law: Race as a Factor in Interracial Adoptions*, 32 Cath. U.L. Rev. 1022 (1983); Note, *Transracial Adoption: A Critical View of the Court's Present Standards*, 28 J. Fam. L. 303 (1989-90).

A. *Both The Original And The Revised Statute Clearly Violate The Equal Protection Doctrine Contained In The Fourteenth Amendment To The United States Constitution.*

Minn. Stat. § 259.28, subd. 2, prior to the legislature's 1992 modification, was struck down by the Minnesota Court of Appeals as violative of the Equal Protection Clause. Prior to the modification, the statute only sought to protect the heritage or racial backagground of minority children. The Court of Appeals correctly struck this down as violative of the Equal Protection Clause. As this Court has previously observed in *Loving v. Virginia,* 388 U.S. 1 (1966) and *Palmore v. Sidoti,* 466 U.S. 429 (1983), the fundamental purpose of the Equal Protection Clause of the Fourteenth Amendment is to proscribe all invidious classifications based on race or ethnic background. In *Loving,* this Court held it unconstitutional for the State to prohibit interracial marriage, while in *Palmore,* this Court prohibited the use race in deciding which two biological parents should have custody of their children. Clearly, the Minnesota statute prior to revision applied only to children of minority racial and minority ethnic heritage who were being adopted and set up a preference scheme based on such prohibited classifications. The Minnesota Supreme Court did not address the finding of the statute to be unconstitutional by the Court of Appeals. Under the same logic of *Loving* and *Palmore,* the statute is unconstitutional and this Court must review this issue.[2]

When the case was appealed to the Minnesota Supreme Court, despite the issues being raised, that court made no ruling on whether the subsequently modified statute was still in violation of the Fourteenth Amendment. The Guardian ad

[2] Bartholet makes the following trenchant observation regarding the critical constitutional issue raised by this dispute: "Current racial matching policies are in conflict with the basic law of the land on race discrimination. And they are anomalous. In no other area do state and state-licensed decisionmakers use race so systematically as the basis for action. In no other area do they promote the use of race so openly. Indeed, in most areas of our community life, race is an absolutely impermissible basis for classification." Bartholet, *supra* note 1, at 1226.

Litem contends that even though the Minnesota legislature removed the specific reference to minority children and now applies the preferences contained in the statute to all children based on their racial and ethnic heritage, the statute is still based on classifications of race and ethnicity, a situation impermissible under the Equal Protection Clause of the Fourteenth Amendment.

As this court indicated in *Loving v. Virginia,* the fact that racial or ethnic classifications apply to all people of all races and ethnic backgrounds does not in and of itself make the statute viable under the Equal Protection Clause. 388 U.S. at 8. Over the years, the Supreme Court has consistently repudiated distinctions between citizens based solely on ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality. Thus, such classifications are to be subjectd to the most rigid scrutiny. 388 U.S. at 11 (citing *Hirabayashi v. United States,* 320 U.S. 81, 10 (1943); *Korematsu v. United States,* 323 U.S. 214, 216 (1944)). *See also, Regents of the University of California v. Bakke,* 438 U.S. 265, 361 (1978) (allegedly benign racial classifications should be scrutinized carefully to ensure that they are truly benign in impact and do not serve to disadvantage their supposed beneficiaries).

Even the revised statute that applies to all children involved in adoptions, regardless of their race or ethnic background, continues to violate the Constitution as a result of the adoption decision continuing to be based heavily on ethnic or racial criteria. Based on her exhaustive research into the issue of transracial adoption, Elizabeth Bartholet has considered statutory schemes similar to the one here at issue and observed that we know that minority children are disproportionately represented in the population of children waiting for adoptive homes, they spend longer waits than white children, and they are less likely to be eventually placed. Agencies apply significantly different parental screening criteria to prospective black adoptive parents than they do to white parents in order to increase prospects for in-race

placements.[3] Thus, even though the statute now on its face applies to *all* children, it will continue to affect more minority children and inherently violate the Equal Protection Clause.

The factors of race and ethnic background should simply have no bearing on whether to grant or deny an adoption petition. Rather, the test more appropriately should remain focused on the best interests of the child – whether that means the child is adopted by parents of the same race or same ethnic background or different race or different ethnic background. The Minnesota Supreme Court has not adequately addressed the issues raised by the Guardian ad Litem and Petitioners herein, the statute as modified by the Minnesota legislature continues to contain impermissible classifications by race and ethnicity, and this significant constitutional issue must be reviewed by this Court.

B. *Application Of Minn. Stat. § 259.28, Subd. 2, By The Minnesota Trial Court And As Affirmed By The Minnesota Supreme Court, Violates The Petitioners' And The Child's Due Process Rights Under The Fourteenth Amendment To The United States Constitution.*

At the trial court level in this case, when applying the statute at issue, the trial court judge did not allow the Petitioners the right to have their adoption petition reviewed and the best interests of the child evaluated under their petition. Rather, the court limited the trial to focusing on the grandparents' petition. Such preference analysis has deprived the child and the Petitioners of their right to pursue the fundamental task of creating a family through the means of adoption. This Court strongly suggested in *Loving* and *Palmore,* cases involving marriage and custody, that the state should stay out of the business of promoting one particular view of families. *See* 388 U.S. at 12 and 466 U.S. at 433. That same logic applies in the context of adoption.

The Minnesota statutory scheme here in issue results in a deprivation of a fundamental liberty interest in creating a

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[3] Bartholet, *supra* note 1, at 1199-1201.

family through adoption. It violates the Due Process Clause of the Fourteenth Amendment and is impermissibly based on suspicious classifications of race and ethnicity. All of this is directly subversive of the principle of equality that lies at the very heart of the Fourteenth Amendment. The proceedings implicity approved by the Minnesota Supreme Court and the statutory scheme also approved by the Minnesota Supreme Court raise significant constitutional issues that must be addressed by this court.

C. *Minn. Stat. § 259.28 Is Unconstitutionally Vague And Unenforceable.*

The Fourteenth Amendment to the United States Constitution guarantees citizens of the United States the right of due process. Inherent in this guarantee is the right to a clear understanding of what a statute provides and a requirement that legislatures enact laws with reasonably clear guidelines so as to prevent arbitrary, discriminatory and unreasonable application by state officials and triers of fact. *See, e.g., Smith v. Goguen,* 415 U.S. 566, 572-73 (1974) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972) where the void for vagueness doctrine is discussed in greater detail). Contained within Minn. Stat. § 259.28, subd. 2, are various preferences in the adoption proceedings based on ethnic heritage and race. Given the complex mixing of religions, cultures, and races that has been deeply rooted in this nation's history and encouraged by this Court's decisions, it has become increasingly difficult to determine with certainty and accuracy a person's racial or ethnic heritage. In fact, the need to make such determinations is a reprehensible task that should not need to be undertaken.[4] Yet, the statutory scheme here at issue sets forth preferences where competing adoption petitions are filed based on a child's race or ethnic heritage.

Clearly, the statute is defective in that it provides no guidance as to how a court is to determine what a child's or the

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[4] *See* Bartholet, *supra* note 1, at 1175-76 for a discussion of the inherently problematical issues that arise when such statutes are applied and the need arises to categorize people based on the shade of their skin color or determine percentages of ethnic background.

prospective adoptive parents' racial and ethnic background is, and how, as a practical matter, trial courts hearing adoption petitions are to analyze the preferences. Not only are the adoptive children being subjected to an unfair and unworkable statutory framework, but the adoptive parents and the biological parents are also provided with no clear guidance or direction. Clearly, this significant defect in the statutory scheme raises important constitutional issues that have been either ignored or inadequately addressed by the Minnesota Supreme Court and that should be heard by this Court of last resort.

II. *THE STATE OF THE LAW ACROSS THE NATION WITH REGARD TO TRANSRACIAL ADOPTIONS AND ISSUES OF RACE AND ETHNICITY IN ADOPTIONS IS IN A CONFLICTED AND CONFUSED STATE, REQUIRING CLARIFICATION AND DIRECTION FROM THE UNITED STATES SUPREME COURT.*

In her article on transracial adoptions, Elizabeth Bartholet documents the numerous approaches the various states, courts, and legislatures have taken in dealing with the issue of race and ethnic heritage in the adoption system. For example, some state and federal courts and state legislatures provide that race and ethnicity cannot be used as a sole factor or as an automatically dispositive factor in adoption placement. Other

courts actually require that race be considered.[5] Significant constitutional issues have arisen through the use of the race and ethnicity in state-supervised and frequently state-directed adoptions. As a result, the federal and state courts of this nation have ruled in a variety of directions in dealing with this difficult issue of how race and ethnicity of a child, of the biological parents, and of the adoptive parents is to be applied. These issues frequently arise is the review of competing adoption petitions filed by relatives, foster parents, and unrelated third parties. The fact that a plethora of state statutes, state court decisions, and federal court decisions have arisen to deal with this issue indicates that direction from the highest court in the land is necessary regarding how race and ethnicity are to be factored into adoption decisions

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[5] For examples of statutes providing a preference for placement with families of the same racial or ethnic heritage, see Minn. Stat. § 259.255; § 259.28; Ark. Stat. Ann. § 9-9-102. For an example of a state with a mandatory waiting period during which children are held while a same race family is sought, see Cal. Civ. Code § 222.35 (1992); § 222.37 (1992); for an example of a statute requiring a state to make an effort to find a same race, ethnic or religious family, see N.Y. Comp. Codes R. & Regs. tit. 18, § 421.18(c) (1990). An example of a statute with simply a preference cited would be Mass. Regs. Code tit. 110, §7,101(1)(d) (1986). For statutes making it illegal to deny adoption solely on the basis of race, see Ohio Admin. Code § 5101:2-48-03 (1990); Md. Fam. Law Code Ann. § 5-311 (Supp. 1991); Wis. Stat. Ann. § 48.82(6) (West Supp. 1991); Conn. Gen. Stat. Ann. § 48.82(6) (West Supp. 1992); Ky. Rev. Stat. Ann. *§ 199.471 (Baldwin 1976).*

For examples of courts that have said race cannot be used as the sole factor, *see, e.g., McLaughlin v. Pernsley,* 693 F.Supp. 318, 324 (E.D.Pa. 1988); *In re Adoption of a Minor,* 228 F.2d 446, 448 (D.C. Cir.1 1955); *Compos v. McKeithen,* 341 F.Supp. 264, 266 (E.D.La. 1972); *In re Davis,* 502 Pa. 110, 465 A.2d 614, 624 (1983); *In re Adoption of Gomez,* 424 S.W.2d 656, 659 (Tex. Civ. App. 1967). For examples of cases where race can be used as a significant and even determinative factor, *see e.g., Drummond v. Fulton County,* 563 F.2d 120, 1205 (5th Cir. 1977) cert. denied, 432 U.S. 905 (1978); *In the Matter of the Petition of R.M.G. & E.M.G.,* 454 A.2d 776 (D.C. 1982); *In the Matter of the Petition of D.I.S. for Adoption of S.A.U.,* 494 A.2d 1316 1327 (D.C. App. 1985). For examples of cases requiring that race be considered, *see, e.g., Drummond,* 563 F.2d at 1205-06; *In the Matter of B. Children,* 391 N.Y.S.2d 812, 813-14 (N.Y. Fam. Ct. 1977); *In re Davis,* 465 A.2d 614, 622 (1983).

and the overarching concern of the best interests of the children involved.

III. *THE ACTIONS OF THE MINNESOTA SUPREME COURT IN THIS MATTER REFLECT A SIGNIFICANT DEPARTURE FROM THE USUAL COURSE OF JUSTICE, FURTHER JUSTIFYING INTERVENTION BY THE UNITED STATES SUPREME COURT TO REVIEW SUCH STATUTES AND PROVIDE FURTHER DIRECTION TO STATE AND FEDERAL COURTS AND STATE LEGISLATURES DEALING WITH THE ISSUE OF RACE AND ETHNICITY IN ADOPTION PROCEEDINGS.*

Statutes such as the statute here at issue dealing with racial and ethnic matching policies in the adoption process are clearly in conflict with the basic law of the land regarding discrimination on the basis of race and ethnicity. The history of racial and ethnic discrimination is a long and complex chapter in American history and the area of adoption is one of the few remaining areas of state and governmental involvement where race and ethnicity have been systematically used as a basis for decision making, completely contrary to the dominant ideology against discrimination and favoring integration. Such notions of equality and integration go back to the seminal decision of *Brown v. Board of Education,* 347 U.S. 483 (1954) and the subsequent *Loving* and *Palmore* decisions.

The statute and the actions of the Minnesota Supreme Court are reflections of a nation-wide dilemma in the area of adoption. As the previously cited cases indicate, a state is not permitted to insist that race or ethnicity count as a factor in the ordering of people's most private lives. In the more public areas of housing, employment, the use of public accommodations, and education, race and ethnicity have long ago been removed as factors for consideration. Race conscious action has generally been allowed only where it can be justified on the grounds of compelling necessity, or where it is designed to benefit racial minority groups either by

avoiding or preventing discrimination or by remedying its affects, as in the case of affirmative action. Such exceptions have, however, been narrowly defined and affirmative action has always been controversial in this country. In fact, in recent years, the Supreme Court has gone so far as to find that even benign racial classifications are highly suspect and must be limited to narrowly defined situations. *See, e.g., City of Richmond v. J.A. Croson Company,* 488 U.S. 469 (1989).

What the statutory scheme and common law doctrines at issue in the case at hand demonstrate is something even beyond affirmative action and actually amounting to a resurrection of what most had assumed to be the long dead doctrine of "separate but equal." *See, Brown v. Board of Education, supra.* The Minnesota legislature in its efforts to deal with the holding by the Minnesota Court of Appeals that the statute was unconstitutional in effect codified the doctrine of separate but equal. The legislature stated that as long as all races and ethnic groups are treated equally, the law of adoption could provide that a preference should be made for same race and same ethnic background adoptions. Clearly, these racial and ethnic matching policies fit none of the recognized exceptions to the anti-discrimination norm.

There is in fact no compelling necessity for racial matching on a level comparable to a national emergency threatening the survival of a culture or a people. Professor Bartholet very capably makes and supports this argument that no minority communities within this nation are threatened with extinction, there is no threat through current adoption practices towards the existence or preservation of any minority community or its culture, nor can racial matching policies be rationalized as programs to eliminate or to remedy the effects of prior

discrimination or otherwise to benefit minorities as a group.[6] Bartholet goes on to say that even a mild preference is unwise as a matter of social policy, given that such preferences violate the principle of the core of our nation's adoption laws, that the best interests of the child should supersede all else.[7]

The literature is truly voluminous in the country today regarding problems of families of all races and ethnic backgrounds falling apart, the increasing numbers of single parents, ever more broken families, and families under attack as a result of violence and drugs.[8] Perhaps at no time in American history has there been more of a need for abandoned, threatened children to be placed in safe homes through adoption; nor has the demand by adoptive parents ever been greater. The statutes and common law as applied by the State of Minnesota do not alleviate that situation, and in fact, make the placement of children, of whatever race or background with parents or whatever race and background, more difficult.

There has been no compelling evidence presented indicating that policy reasons exist justifying an insistence upon same race and same ethnic heritage adoptions. Without such a compelling policy reason underlying the statutes and common law policies as exist in this matter, we are faced with

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[6] Bartholet, *supra* note 1 at 1231-32. It must be noted, however, that this Court has upheld the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (1988), which mandates a preference for placing Indian children with Indians as opposed to non-Indians. *See, Mississippi Choctaw v. Holyfield,* 490 U.S. 30 (1989). It is clear, however, that the American Indian experience in the United States historically, culturally and legally has been unique. American Indian tribes have been actively involved in enforcing the Indian Child Welfare Act, and the cases interpreting that Act offer little precedent to the issues at hand. *See also,* Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children,* 66 U. Det. L. Rev. 451 (1989).

[7] Bartholet, *supra* note 1 at 1252.

[8] *See, e.g.,* Popinoe, *Break-up of the Family: Can we Reverse the Trend?* 119 U.S.A. Today 50 (May 1991); Sorrentino, *Family Troubles,* 15 The Wilson Quarterly 18 (Spring 1991); Johnson, *The Changing Family,* 57 Vital Speeches of the Day 393 (April 15, 1991); Bauerlein, *Why Doesn't the U.S. have a Family Policy?* Sept/Oct. 1991 Utne Reader 17.

a clear and blatant departure from the usual course of justice in the area of discrimination based on ethnicity and race. This departure from the usual course of justice goes to the core of the American family and significant problems facing our nation today, thus making it all the more imperative that this Court grant the petition of the Sharps and review the statutes and adoption case law applied by the Minnesota Supreme Court in this matter.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. This dispute raises a variety of significant constitutional issues either inadequately or incorrectly addressed by the Minnesota Supreme Court. The dispute also raises legal issues that are in a conflicted and confused state across the nation. Finally, the actions of the Minnesota Supreme Court reflect a signficant departure from the usual course of justice. For all of these reasons, it would be appropriate for the United States Supreme Court to fully review the issues raised herein.

Respectfully submitted,

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